

ENVIRONMENTAL ASSESSMENT BOARD



ONTARIO HYDRO DEMAND/SUPPLY PLAN HEARINGS

VOLUME: 184

DATE: Thursday, January 28, 1993

BEFORE:

HON. MR. JUSTICE E. SAUNDERS Chairman


DR. G. CONNELL Member

MS. G. PATTERSON Member

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ENVIRONMENTAL ASSESSMENT BOARD
ONTARIO HYDRO DEMAND/SUPPLY PLAN HEARING

IN THE MATTER OF the Environmental Assessment Act,
R.S.O. 1980, c. 140, as amended, and Regulations
thereunder;

AND IN THE MATTER OF an undertaking by Ontario Hydro
consisting of a program in respect of activities
associated with meeting future electricity
requirements in Ontario.

Held on the 5th Floor, 2200
Yonge Street, Toronto, Ontario,
Thursday, the 28th day of January,
1993, commencing at 9:00 a.m.

VOLUME 184

B E F O R E :

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DR. G. CONNELL	Member
MS. G. PATTERSON	Member

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1 ---Upon commencing at 9:13 a.m.

2 THE REGISTRAR: Please come to order.

3 This hearing is again in session. Please be seated.

4 THE CHAIRMAN: We started a little late
5 this morning because some of the submissions that we
6 received were not received yesterday, and I had to take
7 some time to look through them. As those who know me
8 well will know, I'm a very slow reader.

9 We have received some submissions - this
10 is not in the order of receipt - from Ontario Hydro;
11 from the Ontario government; from the Municipal
12 Electric Association; from AECL; from Energy Probe;
13 from the Moosonee Development Area Board; from CEG,
14 Coalition of Environmental Groups; and from North
15 Channel Advocates.

16 There are really two subjects although
17 they are inter-related. One is what the Board should
18 or should not do as a result of the withdrawal of the
19 application by Ontario Hydro, and, secondly, what the
20 Board should or should not do with respect to the
21 request by the Government of Ontario to participate in
22 a process that would follow the termination of these
23 proceedings.

24 As I say, although those are in a certain
25 extent inter-related it would be perhaps convenient,

1 for us at least, if we spent the first part of the
2 morning dealing with the first issue - that is, the
3 removal or withdrawal of Ontario Hydro's application -
4 and the second part dealing with the issues arising out
5 of the request by the government for a new and
6 different process.

7 As I say, I recognize that those two
8 matters cannot be neatly segregated, but I think that
9 in the first area perhaps the general proposition might
10 be addressed but the specifics might be left for the
11 second part of the morning. It might be easier for us
12 if it were done that way.

13 We have the oral submissions. We have
14 all read them -- I mean, the written submissions.
15 Thank you, the written submissions. We have all read
16 them.

17 Who wants to make oral submissions to
18 supplement their written submissions? Mr. Greenspoon?

19 MR. GREENSPOON: I have no written
20 submissions; I have only oral submissions.

21 THE CHAIRMAN: Right.

22 MR. ANSHAN: Mark Anshan for CAESCO.

23 THE CHAIRMAN: Mr. Heintzman? Mr.
24 Shepherd? Mr. Castrilli, Mr. Poch, Mr. Klippenstein,
25 Mr. Rogers, Mr. Power, Mr. Moran, Mr. Monger, Mr. Mark,

1 and Mr. Campbell. And Ms. Marlatt.

2 MR. MATTSON: Mr. Chairman?

3 THE CHAIRMAN: You don't want to be left
4 out, Mr. Mattson? [Laughter.] And Mr. Taylor, and Ms.
5 Mackesy, and Ms. De Quehen. Well, I suppose I didn't
6 need to ask that question. Mrs. Smith? All right.

7 This is on the first part. Now I am
8 going to ask Mr. Campbell to lead off, please.

9 MR. B. CAMPBELL: Mr. Chairman, on the
10 first part in my submission the application before
11 you --

12 THE CHAIRMAN: Perhaps you could clarify
13 for me what you mean by the 'application' in the
14 context of this process.

15 MR. B. CAMPBELL: The submission of the
16 environmental assessment and the request for
17 approvals--

18 THE CHAIRMAN: All right.

19 MR. B. CAMPBELL: --pursuant to the Act.

20 However, it is my submission that this
21 matter is being raised by Mr. Heintzman and it is more
22 appropriate that he precede me. I would, in my
23 submission, be more appropriately heard last on this
24 matter.

25 THE CHAIRMAN: I was going to give you

1 the benefit of both. By letting you lead off you would
2 have the right to reply, but if you want to just
3 reserve it for reply that's up to you.

4 MR. B. CAMPBELL: If that is the way we
5 are now constituted, then I, in leading off, simply say
6 that our written submissions set out in my submission
7 clearly and succinctly the position we take.

8 This Act clearly contemplates withdrawal.
9 None of the other matters that have been cited by my
10 friends deal with analogous situations where the Act
11 and the statute clearly contemplates withdrawal.

12 The only question, the section I, of
13 course, rely on is Section 7(3), clearly contemplates
14 withdrawal, and it is our position as stated in the
15 submissions that that section not only contemplates
16 withdrawal, it contemplates that the only matter
17 relating to withdrawal that may remain is the
18 Minister's placing of terms and conditions.

19 That is a power that is not referred to
20 the Board pursuant to Section 12, and, as I say, I
21 think our position on that matter is clear, consistent
22 with the Act, straightforward, and in that respect I
23 rely on our written submissions.

24 THE CHAIRMAN: Isn't 7(3) entitled to a
25 possible alternative interpretation which is suggested

1 by Mr. Heintzman in the AECL brief?

2 That you -- Mr. Moran -- take the
3 position that you would do the withdrawal and then the
4 Minister sits down and writes the terms and conditions
5 after you have done the withdrawal, whereas the section
6 could be read is that you are only permitted to
7 withdraw on terms and conditions that may be imposed by
8 the Minister.

9 MR. B. CAMPBELL: In our submission, Mr.
10 Chairman, if that was the intent of the Act it would
11 have words in it analogous to the words that are in the
12 rules; that is, that one can only discontinue with
13 leave.

14 There is no suggestion, in my submission,
15 that the act of withdrawal itself requires leave or any
16 sense of permission, which is the case in analogous
17 circumstances.

18 What the Act says is that the Minister --

19 THE CHAIRMAN: What it says is the
20 proponent may withdraw: subject to such terms and
21 conditions as the Minister may by order impose. That
22 is what it says.

23 MR. B. CAMPBELL: That's correct. And
24 having withdrawn, it is our submission that that act --
25 it is only once that act is done that any question

1 arises as to whether terms and conditions can be
2 imposed, and that in any event that imposition of terms
3 and conditions is not a matter referred to this Board
4 by Section 12 under the reference given to it.

5 THE CHAIRMAN: Oh, I understand that. I
6 am just really concentrating on Section 7(3). That
7 would mean that the withdrawer would certainly be
8 exposed to quite a -- because the Minister presumably
9 could put any terms and conditions she felt appropriate
10 and there would be no recourse on the part of the
11 proponent.

12 MR. B. CAMPBELL: If that is correct,
13 then that is a risk that my client is exposed to.

14 THE CHAIRMAN: I take it as a factual
15 matter that there has been no action of this nature by
16 the Minister of any kind, that there has been no
17 agreement to withdrawal or no terms and conditions
18 imposed or no order or no action by the Minister in
19 this respect.

20 MR. B. CAMPBELL: I am unaware of the
21 Minister having imposed any terms and conditions, but
22 in my submission that is a matter more appropriately
23 spoken to by Mr. Moran. He would have better knowledge
24 of that than I.

25 THE CHAIRMAN: Mr. Moran, has the

1 Minister done anything about this application
2 withdrawal?

3 MR. MORAN: No, Mr. Chairman. And as far
4 as I am able to tell, the Minister doesn't intend to
5 either.

6 THE CHAIRMAN: To do anything?

7 MR. MORAN: That's right, except to
8 invite along with the rest of government the Panel to
9 continue in an advisory capacity. That matter has been
10 previously addressed.

11 THE CHAIRMAN: Thank you.

12 MR. B. CAMPBELL: Thank you, Mr.
13 Chairman.

14 THE CHAIRMAN: Mr. Heintzman?

15 MR. HEINTZMAN: Mr. Chairman and Members
16 of the Board, in my submission the matter to be
17 determined today is an extremely important matter, and
18 it evolves around whether a hearing of this nature and
19 this cost and this duration can be brought to an end at
20 the say of two parties to this hearing, the proponent
21 Ontario Hydro and the Minister, without a decision of
22 this Board.

23 It is our submission that the only way in
24 which this proceeding can be terminated is by a
25 decision of this Board made in the public interest.

1 [9:20 a.m.]

2 Now, I have given to you a factum that
3 sets forth the position, if I could refer you to it,
4 and please stop me if I refer to it too readily, but we
5 spent a great deal of time putting this together and it
6 was not delivered to the Board because it was not
7 finished until late last night, after a good deal of
8 legal research.

9 I apologize to the Board for starting off
10 on a wrong direction last Tuesday, it literally took my
11 breath away that Ontario Hydro could stand before this
12 Board and in one sentence say this hearing has ended
13 and then go on with a commendation, probably
14 well-earned, to the members of its team.

15 But I was so astounded that I was sure it
16 was not possible legally and the sound basis for that
17 conclusion is now stated in our factum, and it is that
18 the statute, Section 12(2), the Statutory Powers
19 Procedure Act and the common law arrive at the results
20 which we say is the legal result that pertains to how
21 this hearing may be terminated.

22 In our factum we have started off by
23 pointing out to the Board in paragraph 1 that it was by
24 an order of the Minister that this hearing commenced
25 dated January 17th, and I don't believe that was

1 entered as an exhibit but it was filed with the Board,
2 that order. In the order the Minister concluded that a
3 hearing was advisable, and so far the Minister has not
4 concluded that a hearing is not advisable, to my
5 knowledge, and the Minister required the Board to hold
6 a hearing.

7 I have pointed out to you that this
8 hearing has engaged a tremendous amount of time,
9 energy, and whatnot over the last numbers of years.

10 In paragraph 4 I have pointed out to you
11 that there is no order of this Board permitting this
12 withdrawal. There is no order of this Board deciding
13 or disposing of this proceeding, and that will be the
14 fundamental point I will make.

15 I point out that no ministerial order has
16 been granted authorizing anything, and I will be
17 submitting that no ministerial order is appropriate.
18 It's an order this Board, but I will suggest that if we
19 are wrong, then there is another mechanism which
20 perhaps will get to us the same result under Section
21 7(3), although throughout I will be submitting that
22 Section 7(3) does not apply, that it is up to this
23 Board to determine whether this hearing ends and make
24 that determination in the public interest.

25 I point out in the paragraph 4 that no

1 order this Board or the Minister has concluded that a
2 hearing or a continued hearing is not advisable.
3 Indeed, I would say that the only thing you can read
4 from the government actions that the government is
5 saying, yes, it is advisable that something be done
6 with all of the information and exhibits and evidence
7 that has been accumulated.

8 Now, my basic submissions are contained
9 in paragraph 6; firstly, that Ontario Hydro is not
10 entitled as of right to withdrawal its environmental
11 assessment; secondly, that the proceeding can only be
12 disposed of by a decision the Board, and that means
13 that the Board has jurisdiction to determine whether or
14 not Ontario Hydro's environmental assessment may be
15 withdrawn and on what terms. And if the Board deems it
16 appropriate to complete this hearing, the Board is
17 entitled to do so. And I emphasize again, that
18 decision must be made by you in the public interest.

19 I want it to be clear as I made it clear
20 in paragraph 16 that AECL does not consent to the
21 serial of termination this hearing, and that may be
22 important when we come to consider the Statutory Powers
23 Procedure Act, but AECL has said in this document that
24 it recognizes that you and the public interest may
25 conclude that this hearing ought not to be continued

1 because it's Ontario Hydro's and the government's
2 position that it ought not continue. So we have
3 suggested, and I will defer to the second part of the
4 discussion this morning, the terms upon which we say
5 you ought to determine the hearing if you decide to
6 determine it, to end it. And that is that the matters
7 which have been accumulated before this Board and the
8 issues before this Board are fully, fairly and
9 expeditiously dealt with in any alternative procedure.
10 We have suggested one which will allow this Board to
11 be, in effect, an inquiry board similar to the federal
12 environmental hearings, and discharge your
13 responsibilities as you deem it appropriate and render
14 to yourself the ability to control your own procedure
15 in a way that perhaps is not or has not been possible
16 in this hearing.

17 I make the point in paragraph D that if
18 you are not able to arrive at terms of reference that
19 are satisfactory to you, or if for any reason you
20 decide not to embark upon the inquiry, you should issue
21 a decision only following written and oral argument.
22 Now I have said that not suggesting what will happen
23 with respect to oral evidence, but just as a precaution
24 that if you decide not to embark or to terminate this
25 hearing now, that the very least that should occur is

1 some written oral argument before you do your final
2 decision-making process.

3 THE CHAIRMAN: Written and oral argument
4 covering what?

5 MR. HEINTZMAN: Covering what has gone on
6 in this hearing to date.

7 THE CHAIRMAN: You mean just to date? Is
8 that what you mean?

9 MR. HEINTZMAN: No, no, and with respect
10 to the documents that are filed.

11 What I don't want to do is get into a
12 long discussion, I just put that paragraph D in there
13 to say that the very minimum that has to occur is
14 written and oral argument upon all of the evidence that
15 has been tendered before you. What we do with the
16 evidence is a matter that we have not addressed in this
17 argument and it will require discussion as to whether
18 rights of cross-examination in an abridged form or
19 whatever form ought to be accorded.

20 That was only there to say don't
21 terminate this hearing if you decide to not go down
22 some of the routes are proposed without at least the
23 opportunity for written and oral argument in this
24 hearing.

25 Now, we have said as an alternative, and

1 I want to stress only an alternative, if Section 7(3)
2 has any application, then there is mechanism which we
3 submit may get to you the same point; that is, may
4 entitled you to exercise the inquiry process or embark
5 upon the inquiry process for the purpose of advising
6 the Minister as to whether she should or should not
7 accept the termination or accept the withdrawal and the
8 terms and conditions. That may entitle you, it's not a
9 route that we are saying has any legal validity, but it
10 may get you to the same result as the one that is being
11 proposed to you by the Minister.

12 Now, if I may turn to paragraph 7 of the
13 factum, and what I have said in paragraph 7 is that
14 Sections 6 to 11 of the Act clearly contemplate a time
15 at which the Minister is considering and reviewing the
16 assessment. Those sections do not deal with what
17 happens when this matter is then referred to this
18 Board. And so when we find Section 7(3) it seems to me
19 a matter of plain statutory interpretation,
20 particularly when we get to the terms of the Statutory
21 Powers Procedure Act that what Section 7(3) is saying
22 is that when the Minister has this in his
23 possession, when he is reviewing it, and before he
24 refers it to the Board, he has the power to permit it
25 to be withdrawn on such terms and conditions as he may

1 deem appropriate.

2 THE CHAIRMAN: What do you say to the
3 government's argument that that applies to the
4 amendment power in 7(3) but not to the withdrawal
5 power, that the Minister retains the withdrawal ability
6 to impose terms and conditions, because that was not
7 submitted, that's not part of the jurisdiction, if I
8 understand the position of the government, that's not
9 part of the jurisdiction conferred on this Board.

10 MR. HEINTZMAN: I say that that is just
11 not admissible on the plain terms of Section 12(2) and
12 the Statutory Powers Procedure Act, because the
13 Statutory Powers Procedure Act contemplates that there
14 may not be conclusion to the hearing in the normal
15 course. It contemplates that the proceeding can be
16 determined by agreement, by consent, but a decision of
17 the Board not made with an oral hearing, et cetera.

18 So that the idea of a termination of a
19 hearing by a withdrawal is something that is common to
20 any sort of administrative procedure. It doesn't just
21 relate to proceedings before this Board.

22 The phenomenon of withdrawing an
23 application or entering into settlement is something
24 that is well-known in judicial proceedings,
25 administrative law proceedings, not just before this

1 Board.

2 Well, the Statutory Powers Procedure Act
3 presumably knew about that, provided for the mechanism
4 in which a withdrawal could be affected. The Statutory
5 Powers Procedure Act speaks to that issue.

6 Now, I would like to start off the
7 analysis of Section 12(2) by pointing out that the
8 Minister's notice does require, and is required to
9 require the Board to hold a hearing, require the Board
10 to hold a hearing with respect to the environmental
11 assessment. So that's what happened here, the Minister
12 has required to you hold a hearing. And under Section
13 12(3) it says, the section says, the Board shall hold
14 the hearing and decide. The Board shall hold the
15 hearing and decide. So it is mandatory the Board shall
16 decide the matters referred to it in the notice of the
17 Minister.

18 Now, you say, well, does that have to be
19 a final decision. Well, I respectfully not. It may be
20 that the Board will decide to terminate the hearing,
21 but it must decide. Section 12(3) contains a mandatory
22 requirement that does not permit the unilateral
23 withdrawal, it permits you to terminate this hearing
24 now if you wish to by a decision.

25 Paragraph 10 of the my factum then points

1 out - and I am not going to refer to some of the other
2 provisions of the factum that can be taken as read -
3 refers you to the Statutory Powers Procedure Act
4 reference in Section 18(2) of the Act. So that this
5 Board is subject to the Statutory Powers Procedure Act.

6 THE CHAIRMAN: By the way, it's a small
7 thing, I think it is 18(26)

8 MR. HEINTZMAN: 26, sorry.

9 MS. PATTERSON: In the 1990 RSOs.

10 MR. HEINTZMAN: Thank you. And then in
11 paragraph 12 of the factum I have referred to you the
12 Section 4 and 17, which make it abundantly clear that
13 absent agreement or consent, this hearing can only end
14 by a decision.

15 The important words in Section 4 of the
16 Statutory Powers Procedure Act, are 'under unless
17 otherwise provided in the Act'. Now, in my respectful
18 submission, Section 12(3) specifically otherwise
19 provides. It says that the Board shall hold a hearing
20 and shall decide. I submit that this is a public
21 policy statement to this Board that it cannot permit an
22 application before it to be decided by way of consent
23 or agreement, it may well take that consent or
24 agreement into consideration, it may well give very,
25 very strong weight to that consent or agreement, but

1 nevertheless, it is otherwise provided, namely, that
2 consent or agreement cannot terminate this hearing.

3 MS. PATTERSON: Mr. Heintzman, isn't it
4 different, though, if a proponent withdraws as opposed
5 to enters into an agreement with other parties?

6 I interpret this section of this
7 Statutory Powers Procedure Act to be dealing with
8 settlements rather than withdrawals.

9 MR. HEINTZMAN: No, in my respectful
10 submission, it says a proceeding may be disposed of by
11 agreement, consent. So the disposition process
12 contemplates these mechanisms.

13 If it was admissible before an
14 administrative tribunal that the party could withdraw,
15 just walk away from the hearing, I am sure the
16 Statutory Powers Procedure Act would have addressed
17 that.

18 It's a well known phenomenon. It's
19 well-known in courts. Every administrative tribunal
20 knows that a party may wish to withdrawal.

21 What this section is saying, is no, under
22 our law in Ontario, if a proceeding is to be terminated
23 it can only be by agreement, consent or decision. So
24 if a party wishes to withdraw, he can only do so
25 without consent or agreement by a decision of the

1 tribunal.

2 MS. PATTERSON: What about this clause in
3 Section 4 that says 'or the tribunal otherwise
4 directs'.

5 MR. HEINTZMAN: Yes.

6 MS. PATTERSON: What do you think that
7 means?

8 MR. HEINTZMAN: Well, if you were to
9 direct, which is another form of a decision. If you
10 were to direct that, and leaving aside the words
11 'unless otherwise provided', which I submit covers the
12 situation, that's merely another mechanism for the
13 Board to decide that the proceedings should come to an
14 end.

15 Now, the Board itself --

16 [9:38 a.m.]

17 THE CHAIRMAN: Just a moment. Have you
18 passed Section 4?

19 MR. HEINTZMAN: Yes.

20 THE CHAIRMAN: The decision that you are
21 asking us to make isn't covered in Section 4, is it?
22 There is no agreement, there is no consent order, and
23 there is no decision without a hearing or without
24 compliance with any other requirement of the Act.

25 MR. HEINTZMAN: That's right.

1 THE CHAIRMAN: So it is a different kind
2 of -- the decision that you are asking us to make isn't
3 covered by Section 4.

4 MR. HEINTZMAN: But I am saying that the
5 Board can only determine this hearing or the hearing
6 can only be determined by a decision.

7 THE CHAIRMAN: But then, doesn't it
8 follow that this -- doesn't that reinforce the argument
9 or may it not reinforce the argument, this section,
10 that the actual disposition of a matter by a decision
11 is not in Section 4; that was not part of Section 4?

12 MR. HEINTZMAN: Well, with respect, no,
13 Mr. Chairman. In my respectful submission --

14 THE CHAIRMAN: Supposing this hearing
15 went its full course and we came to the end and we made
16 a decision. How is that a disposition within the
17 meaning of Section 4?

18 MR. HEINTZMAN: Well, it is a
19 disposition, it is a disposition that perhaps doesn't
20 require the application of Section 4 in the sense that
21 it is not by agreement, consent or without a hearing or
22 without compliance with other requirements of the Act.

23 THE CHAIRMAN: So there can be
24 dispositions outside the ambit of Section 4?

25 MR. HEINTZMAN: Well, not outside the

1 ambit of the Act.

2 If you read the totality of the Statutory
3 Powers Procedures Act it says there shall be a hearing,
4 the board shall make a decision, and taken in its
5 totality the Act is saying there must be a hearing and
6 the board must decide the issues before it.

7 This section speaks as closely to the
8 kind of circumstance that is now contemplated here as
9 any does, and it is saying, lookit, if you want to
10 depart from what the Act is saying, the Statutory
11 Powers Procedures Act, then these are the kinds of
12 mechanisms you can engage in, but they require one of
13 these three things.

14 Now, you may be correct in saying that
15 this section doesn't specifically address a hearing
16 that goes to its conclusion and makes a decision, but
17 that is what the Act, the Statutory Powers Procedures
18 Act does in its totality. It contemplates that normal
19 mechanism of decision.

20 If the matter were not clear enough -- in
21 my respectful submission, the matter is clearly enough
22 dealt with in Section 12(3) the Environmental
23 Protection Act itself, but in the regulation which I
24 refer to under paragraph 13 of the factum the
25 regulations make it clear that after every - not some,

1 but every - hearing of the board a report or decision
2 shall be provided by the board, so that there is a
3 mandatory requirement that the board render a decision
4 after every hearing.

5 Now, some may feel that is just a
6 procedural matter, you have got to issue a decision.
7 In my respectful submission it is procedural, but it
8 requires this Board as a matter of procedure to issue a
9 decision.

10 Now, if that is a decision only to allow
11 the settlement or the withdrawal, fine. That is a
12 decision, but it is a decision that must be rendered in
13 accordance with the purpose of the Act.

14 I have submitted -- dropping through
15 paragraphs 14 and 15 which is argument, which I have
16 made orally, paragraph 16, in my respectful submission
17 Section 7(3) clearly has no application. That
18 subsection applies when the environmental assessment is
19 before the Minister for her review and before the
20 environmental assessment is referred to this Board.

21 In those circumstances there is no
22 proceeding, the board is not involved and the
23 provisions of the Act and the Statutory Powers
24 Procedures Act relating to proceedings before this
25 Board do not apply. Once the jurisdiction of the board

1 is engaged, then the hearing may only be terminated as
2 provided for in the Act and the Statutory Powers
3 Procedures Act.

4 Now, I have referred in paragraph 12 to a
5 plethora of decisions of courts, tribunals, and whatnot
6 in this province which have said universally and
7 unanimously that an administrative tribunal in this
8 province is not in the position of merely accepting a
9 withdrawal by an applicant of his application. The
10 Board must still make a decision in the public interest
11 whether that application should be withdrawn.

12 And I don't want to refer to all of the
13 cases. I have given them to the Registrar, and I have
14 yellowed them for your convenience, and if they could
15 be handed to you I would merely like to refer to two of
16 them.

17 MR. GREENSPOON: Has he provided copies
18 for other parties of these cases?

19 MR. HEINTZMAN: They're right here.
20 (Indicating)

21 The only two to which I wish to refer
22 is--

23 MR. GREENSPOON: Well, just hold on.

24 MR. HEINTZMAN: --re County of Oxford
25 Holbrook Waste Disposal Site Expansion, a decision of

1 this Board, and re Carfrae Estates Ltd. and Stavert, a
2 decision of the Divisional Court.

3 In re County of Oxford - does the Board
4 have a copy of that decision - a decision of this
5 Board, there was a settlement. If you turn to page 7
6 off the decision and you refer to paragraph 1 at the
7 bottom of the page counsel also made the following
8 statements and suggestions: All parties were in accord
9 with the terms of the agreement. So that was situation
10 where all the parties before the board were in accord
11 with the agreement.

12 Nevertheless, you will see as part of the
13 settlement, paragraph 4 on the next page, all parties
14 propose that a panel composed of experts for the four
15 parties be set up forthwith to answer questions from
16 the local citizens.

17 So notwithstanding the settlement the
18 board empanelled the experts to be questioned by the
19 local citizens.

20 And at the bottom of page 71 the board
21 said: The Board was gratified to learn that the
22 parties had reached this agreement and expressed itself
23 accordingly. At the same time, the Board concluded
24 that had there were three criteria to be satisfied
25 before the terms of the agreement could be adopted:

1 The terms and recommendations should
2 be supported by the sworn evidence given
3 at the hearing;

4 Two, the terms and recommendations
5 should be scrutinized by the Board and
6 found to be technically and otherwise
7 satisfactory;

8 Three, the agreement must be in the
9 public interest.

10 In my respectful submission, that is the
11 kind of function which this Board must go through in
12 order to render a decision of this nature; that is, a
13 settlement. The Board has to render a decision before
14 the hearing may be terminated.

15 MS. PATTERSON: I guess the distinction
16 that I see is that in that case an approval issued
17 because the parties had settled on what they thought
18 adequate conditions would be and the status quo was
19 therefore changed.

20 In this case we have an application to
21 withdraw where no approvals would be given and the
22 status quo would not be changed. So how do you think
23 this applies to our situation?

24 MR. HEINTZMAN: Well, in my respectful
25 submission, if the public interest has to be addressed

1 in a landfills case it more certainly has to be
2 addressed in a case involving the electricity supply to
3 the province of Ontario and --

4 MS. PATTERSON: But that is not --

5 MR. HEINTZMAN: -- starting, so that is
6 the first -- I would say that the public interest --
7 and that is what all these cases say: To what extent
8 is the public interest engaged, and to what extent is
9 it merely a lis between the parties who have entered
10 into the settlement. To the extent that it is merely a
11 lis between the parties the obligation of the Board to
12 scrutinize the decision and to make a decision in the
13 broad public interest is minimal. To the extent that
14 it is a broad public issue the obligation of the Board,
15 its involvement in the process, is that much greater.

16 So that is the first thing I would say.

17 As to the second point, if I understand
18 the point being made that Ontario Hydro would not now
19 be asking for approvals, that's fine.

20 Our position is: Is that an appropriate
21 plan for the next 25 years? Is it appropriate that
22 Ontario Hydro plan for the next 25 years without
23 anything, and is it appropriate for this Board to allow
24 this application to be withdrawn without anything being
25 provided for, particularly in light of the evidence

1 that you have heard concerning the necessity for
2 planning to commence for generation alternatives within
3 a few years?

4 And we will be coming forward at the end
5 of the hearing and saying, it is all very well that
6 they are not asking for approvals, but we don't think
7 that is a sound plan. Do you?

8 If you don't think that is a sound plan
9 then you will make recommendations to the Minister
10 saying we have heard what has been put before us; we
11 don't think it is very sound, this is what we think
12 should occur.

13 So the mere fact that the Applicant in
14 another form is making an application saying we are not
15 asking for any approvals doesn't mean that you may not
16 say that is not sound planning.

17 In other words, the content of the
18 specific order requested by the Applicant, it may be
19 nothing. They may have come to this Board in the
20 initial hearing and said, we want you to know that in
21 the next 25 years Ontario Hydro requires nothing and
22 that is very sound and here are the reasons, and we
23 would be here saying exactly what we are now: that is
24 not sound planning, that is not sound utility practice.

25 MS. PATTERSON: But if you carry your

1 argument to its logical conclusion any proponent who
2 makes an application and enters into a hearing is then
3 hostage to the hearing process.

4 Then we have to go ahead and spend
5 another year or whatever length of time is necessary,
6 make a decision which the proponent does not -- or
7 decide on an approval that proponent doesn't want and
8 would presumably not implement.

9 MR. HEINTZMAN: Well, yes. But I don't
10 see anything unusual about that. First of all, you
11 don't have to. [Laughter.] You don't have to. You
12 might say no, the Applicant has withdrawn it
13 application. We think in the public interest that
14 should occur.

15 If you are right, Ms. Patterson, if you
16 are right that that is not in the public interest for
17 that to occur then you won't so order. You will say,
18 fine, the Applicant has withdrawn its application, that
19 has such an overwhelming impact on my view of the world
20 that I am not going to continue with this hearing.

21 That is all I say to that, and that is
22 what all these cases say, is that yes the board will
23 give very serious consideration to the applicant's
24 position, but it is not the whole song, and that you
25 have a right to say there is a more important issue

1 here, Mr. Ontario Hydro, and it is this. And before
2 that process occurs you have to say that.

3 And if you don't believe -- and that is
4 why AECL, in my respectful submission, very responsibly
5 has said in this factum you may very well decide that
6 in view of the proponent's position and the
7 government's position it is not worthwhile to proceed
8 on this further, and we have addressed that.

9 But it is fundamental and fundamentally
10 important, and citizens are going to look back on this
11 day and say did this Board discharge its responsibility
12 in the public interest, did it decide that it was in
13 the public interest that Ontario Hydro's application,
14 its wish to withdraw it, was so overpowering that this
15 hearing having spent, some say in the press, \$60
16 million and what all, that that drives that result so
17 overpoweringly? If it does, we will abide by that
18 decision. And that is what we have said in this
19 factum.

20 DR. CONNELL: Mr. Heintzman, it is clear
21 from page 72 under the caption "Recommendations" that
22 the application remained before the board and the
23 application was in fact approved. Is that --

24 MR. HEINTZMAN: Yes, the board made it
25 decision in accordance with what it perceived the

1 settlement to be and having done what it did in this --
2 as recorded in the decision.

3 DR. CONNELL: And the County of Oxford
4 intended that its application should remain before the
5 board; am I correct?
6 [9:50 a.m.]

7 MR. HEINTZMAN: I don't know that.

8 DR. CONNELL: There was no attempt to
9 withdraw as far as you know?

10 MR. HEINTZMAN: I don't recall that, Dr.
11 Connell.

12 Most of the other cases we have given to
13 you are cases where the applicant is seeking to
14 withdraw and the board is saying, no, we have a
15 decision to make here, and we intend to make it. It
16 may be that your wish to withdraw will be acceded to
17 but we have a decision to be made. I just don't
18 remember whether that debate got into that case.

19 But the issue stated in paragraph 3 on
20 page 72, in my respectful submission, is the minimum
21 requirement whether it be by way of withdrawal -- the
22 agreement be by way of withdrawal or by way of whatever
23 before the Board. If the Board's jurisdiction is
24 engaged, that requirement must be satisfied, whether it
25 be by way of withdrawal or whatever.

1 Now, if I could ask you to look at the
2 decision that Mr. Justice Reid in the re Carfrae
3 Estates Ltd. and Stavert decision. And that was a
4 situation where a landlord wanted to withdraw its
5 application to a rent review officer, a process that I
6 would have thought engaged the public interest a lot
7 less than what we have before this Board.

8 Nevertheless, let us see what Mr. Justice
9 Reid and the Divisional Court had to say about the
10 process. Starting at page 539, near the top of the
11 page:

12 "The second round of attack is that
13 rent review officer failed to permit the
14 landlord to withdraw the application he
15 had initiated. It is submitted that as
16 of the point where the landlord expressed
17 a desire to withdraw his application the
18 rent review officer had no jurisdiction
19 to further deal with it. Mr. Hutton has
20 stated plainly that it is his submission
21 that the statute confers upon the
22 applicant, the landlord or tenant, in
23 this case the landlord, the right to make
24 a unilateral withdrawal of an application
25 at any point prior to hearing and at the

1 hearing."

2 I won't read to you all of the parts that
3 we have highlighted, but if you would turn to page 540,
4 near the bottom of the page, just below the quoted
5 Section 5(11):

6 "By section 5(12) the rent review
7 officer has power to set a common date
8 for the hearing of what could possibly be
9 a great number of issues involving a
10 great number of persons not originally
11 party to the application.

12 The significance of this provision is
13 that it involves potentially the
14 inclusion in the hearing of persons who
15 were not made parties by the applicant.
16 This could be any or all of the other
17 residents of an apartment building, for
18 instance. It is obvious from this and
19 other sections that an order made by an
20 officer is an order that affects the
21 premises and not merely the persons made
22 parties by the applicant. The
23 legislation is concerned with rentals of
24 residential premises, not merely
25 agreements between the parties to a

1 rental agreement. In a real sense
2 therefore, the order contemplated is an
3 order in rem."

4 And on page 541, after referring to the
5 cases in the middle of the page, the Court continued:

6 "...there are two criteria that the
7 Courts recognize in approaching this
8 question. One is whether or not the
9 tribunal is performing a public duty. It
10 is argued by the applicant that the duty
11 here is not a public duty because it is a
12 deliberation by the tribunal of the
13 rights of private parties. We see a
14 significant difference between the kind
15 of deliberation characteristic of the
16 operations of the law Courts and the kind
17 of deliberation that can occur before the
18 rent review officer. As I have said, the
19 nature of the order that ultimately
20 results is an in rem order. It is not an
21 order merely binding upon the parties
22 brought before the tribunal as would be
23 an order of a Court relating to a lease.
24 We are inclined to the view that the rent
25 review officer here is performing not

1 merely the function of deciding between
2 private parties but a public duty to set
3 fair rents for apartment buildings and
4 other tenancies. As an in rem order it
5 has an affect beyond the parties to it."
6 And turning to page 543, in the middle
7 the page, the Court says:

8 "Let us look at it from another point
9 of view. Is there anything that suggests
10 that there is no right of unilateral
11 withdrawal? The Act appears to
12 contemplate that an application will
13 proceed once initiated to a hearing. We
14 are particularly impressed with Section
15 5(11) which provides that after the
16 application is launched the officer may
17 at his discretion add other issues and
18 impose upon perhaps an unwilling
19 applicant the necessity of facing
20 settlement of all the tenancies in a
21 possibly very large apartment building.
22 The section seems to us to mean that once
23 the application has been initiated, it is
24 taken out of the of the hands of the
25 initiating party. The tribunal acquires

1 an interest. It would be odd indeed to
2 allow an applicant to withdraw after an
3 officer has, in his discretion, ordered
4 the landlord to file application for
5 settlement of rents and numerous other
6 cases pursuant to Section 5(11). This
7 suggests to us that the matter leaves the
8 hands of the initiator once his
9 application has been launched."

10 And I say, with respect, if that applies
11 to a rent review application, it applies
12 overwhelmingly, once the Minister has sent to this
13 Board the kind of application with respect to the kind
14 of policy issues that this application involves.

15 At the bottom of that page the court
16 continues:

17 "If there is an apt analogy it is
18 perhaps to the proceedings of the Court.
19 There is a strong resemblance between the
20 proceedings before a rent review officer
21 and the proceedings of the civil Courts.
22 It is beyond question that after a
23 certain point a plaintiff, in the civil
24 Courts, may withdraw only with the
25 consent of the other side or with the

1 consent or approval of the Court. The
2 object is to prevent abuse of the Court's
3 process and avoid prejudice to persons
4 affected. That point, for the purpose of
5 the Residential Premises Rent Review Act,
6 could reasonably be taken to be the point
7 at which notice is given under Section
8 5(8), for similar reasons. In other
9 words the implication of the giving of
10 that notice..." I say the same thing
11 with respect to the notice referring the
12 matter to this Board "...is that the
13 tribunal has become seized of the issue
14 and has the right to protect its own
15 interests and those of other persons.
16 The impression that as of the launching
17 of an application the matter leaves the
18 applicant's hands is thus strengthened."
19 I don't think there could be stronger
20 language that is contained in text 12(3) of the present
21 Act, that says that the matter once before this Board
22 on the most public policy of all issues is now in the
23 domain of this tribunal.

24 DR. CONNELL: Mr. Heintzman, could I draw
25 your attention to the reference on page 542 to the

1 so-called English decisions at the bottom of the page,
2 about five or six lines up.

3 "...if there is nothing in the statute
4 that expressly says there shall be no
5 right of withdrawal a right of withdrawal
6 exists."

7 Could you comment on that?

8 MR. HEINTZMAN: Yes. And it continues:

9 "These decisions must rest on the
10 context of the statute in relation to
11 which they are given. There has been no
12 attempt to equate the statute before us
13 with the legislation that was before the
14 English Courts. It does not appear that
15 the English Courts in those cases rested
16 their decision on any external governing
17 principle..."

18 But simply on interpreting the language
19 of the Acts.

20 Well, what I say is that I think it is
21 accepted administrative law, accepted in administrative
22 law that a tribunal acting in the public interest has
23 control over its process. That's the law. Whether you
24 are at one end of the spectrum where you are dealing
25 with a matter which is simply a list between the

1 parties, or whether you are at the other end dealing
2 with a matter which the Board or tribunal is dealing
3 with in the public interest. And in that context, in
4 the latter case, the Board has control over the process
5 and is not obliged to allow the termination of the
6 hearing at the whim of the applicant.

7 THE CHAIRMAN: Just so I understand your
8 submission...your submission is that if Hydro comes in
9 and asks to withdraw its application, that we then have
10 jurisdiction to say no you can't do that, you must
11 continue with the hearing.

12 MR. HEINTZMAN: Yes.

13 THE CHAIRMAN: So we should have done
14 that, I suppose, when 452 came in and they asked for a
15 reduction of the the approvals. The same thing would
16 apply to the request for approvals, would they not?

17 MR. HEINTZMAN: I think Ontario Hydro, as
18 I looked back on it last night, was very careful to say
19 that it was not amending its application. It said this
20 is an update, this is our present information, all we
21 are asking for at the present time is this in terms of
22 approvals.

23 THE CHAIRMAN: But wouldn't it also be
24 subject to the same kind of considerations? If they
25 come in and ask for a reduction, to reduce the

1 approvals, to let's say the request to no longer ask
2 for approval for major supply, wouldn't your argument
3 equally apply to that?

4 MR. HEINTZMAN: I don't see that it would
5 in the sense that the list, that the matter is still
6 before the Board.

7 If Ontario Hydro says we don't want this
8 particular approval, or we are telling you now at the
9 end of the hearing we will not ask for this particular
10 approval. We are asking for A, B, C and D. We are
11 telling you now that at the end of the hearing we will
12 not be asking for D. That's, in effect, what they
13 said. But it is up to -- other parties could say, but
14 we want to you approve D. So the matter is still in
15 the competence of the Board to decide D.

16 THE CHAIRMAN: Well then, then it would
17 have been all right for Mr. Campbell on Monday to have
18 said, we are not withdrawing the environmental
19 assessment but we are withdrawing our request for a
20 range of hydraulic approval.

21 MR. HEINTZMAN: Yes. Well, we are here
22 to tell you that at the end of this hearing we will not
23 be asking for approval of hydraulic, just as they did
24 in the Manitoba Purchase.

25 THE CHAIRMAN: Then what would our

1 jurisdiction be under Section 12(2) other than to
2 accept the environmental assessment with amendment?

3 MR. HEINTZMAN: Well, there may be
4 parties who would say, no, I think you should approve,
5 you should approve hydraulic. It is only fit and
6 proper planning to approve that hydraulic.

7 THE CHAIRMAN: Or I suppose any other
8 approvals that have been removed, or even approvals
9 that were never asked for.

10 MR. HEINTZMAN: Yes. And I am reading
11 your decision and that's basically what I think you
12 said. I am reading from your decision:

13 It is generally agreed by the parties
14 that the description of the undertaking
15 must be made by the proponent and that
16 only the proponent may change that
17 description.

18 The position of Ontario Hydro is that
19 the undertaking has not changed. This
20 position must be based on an
21 understanding by Ontario Hydro that the
22 undertaking is a program in respect of
23 activities and that the requested
24 approvals constitute a method of carrying
25 it out.

1 So all Ontario Hydro is saying, we are
2 changing the method by which we are proposing to carry
3 out this undertaking, and it doesn't now include
4 hydraulic. Someone else may say, well, in our view
5 that's not sound planning, or that's not sound utility
6 practice or whatever. But it seems to me that's
7 exactly what you were saying back last March and April.

8 DR. CONNELL: It would be a rather hollow
9 undertaking though, wouldn't it, if there were no
10 activities or approvals associated with it?

11 MR. HEINTZMAN: No, with respect not.
12 They have to provide energy to the citizens of this
13 province in the next 25 years.

14 They have to convince you, in my
15 respectful submission, that the plan that they have is
16 appropriate. If you said to them, that is not an
17 appropriate plan, you would make your recommendations,
18 I would suggest, to the Minister. The Minister may not
19 accept them. Ontario Hydro may not accept them, but it
20 lies with you to say that's not appropriate at all.

21 DR. CONNELL: What would be the
22 undertaking if the hydraulic approvals were removed
23 from it?

24 MR. HEINTZMAN: Exactly what the Board
25 said last March and April. A program of activities

1 which would not now include any hydraulic, any
2 whatever, as part of the plan.

3 DR. CONNELL: A program without
4 activities then.

5 MR. HEINTZMAN: Program without
6 activities, exactly.

7 If the Board has jurisdiction to say that
8 program with those activities is not appropriate, it
9 certainly has the jurisdiction to comment if the
10 applicant says we thought we needed activities, we
11 don't now and you think they do.

12 If you don't have the jurisdiction to do
13 that, I would be extremely surprised, and you are here
14 to tell them that what they think they need is
15 inappropriate, what they propose they need is
16 inappropriate.

17 The Uniroyal decision is another one
18 referred to by me in paragraph 17, and I have
19 highlighted for you -- again it was an effort by an
20 appellant in that case to withdraw an appeal to the
21 Environmental Appeal Board. The Board at great length
22 set forth its views that it was a public policy
23 tribunal, it was obliged to be engaged in the process.
24 it gave great weight to the appellant's desire to
25 withdraw the appeal, but it did engage in the process.

1 And I refer you to that decision for that purpose.

2 MS. PATTERSON: I have a question about
3 the Uniroyal decision. On page 9 the board addresses
4 the question: Can the board refuse the applicant's
5 need to withdraw their appeals, and then it talks about
6 whether they would be prejudice to the public or to
7 other parties from the withdrawal, and states three
8 instances where it thinks that the possibility of
9 prejudice will arise. I would like your views on
10 whether any of these apply in this case, given that in
11 that case the settlement was in the view of the other
12 parties to undermine the original order or weaken it,
13 and to cut the parties out of the process further down
14 the line.

15 [10:09 a.m.]

16 MR. HEINTZMAN: Well, in that case it was
17 a much more, if I can call it, lis-orientated issue in
18 that there was a specific order against a specific
19 party that he do or not do certain things.

20 The decision of the director was amended
21 or changed in some respect, and the real issue was not
22 so much what is the damage to the environment but what
23 is the damage to the process and to the process of the
24 Minister's order.

25 Now, I would say the same thing applies

1 here.

2 If an Applicant can do this, I suggest to
3 you that there will be tremendous damage to this Board.
4 If someone can get \$60 million through a hearing and
5 then say, I'm out of here and you can't do anything
6 about it and nobody else can, well, I leave you to
7 determine what that will do to the integrity of this
8 Board.

9 Certainly, you will be the only board
10 like that in Ontario that I have heard of. No other
11 board thinks it has that limited or absence of
12 jurisdiction, and every other board that has addressed
13 it the courts have said no, you have the jurisdiction
14 to decide.

15 But I don't think the issue of
16 interference with a subservient official's decision and
17 its integrity is involved in the present case. The
18 present case involves the integrity of this Board, its
19 process, and the obligation of this Board to act in the
20 public interest.

21 THE CHAIRMAN: But what we have to decide
22 initially is, do you agree with -- I just want to make
23 sure I understand your position.

24 What we have to decide initially is
25 whether or not we will give leave to the proponent to

1 withdraw its undertaking, its environmental assessment.

2 MR. HEINTZMAN: Yes, that is in my
3 respectful submission what you must decide.

4 THE CHAIRMAN: And if we decide that that
5 leave ought to be given, then we have nothing else to
6 decide at that point.

7 MR. HEINTZMAN: Absolutely. And that is
8 why we say this is such an important point, because you
9 have the opportunity now, before you grant that
10 decision, to do something.

11 If you don't -- if do you it after you
12 have decided you won't have any jurisdiction other than
13 costs and whatnot.

14 THE CHAIRMAN: Well, it goes without
15 saying that we still would have, as we would in any
16 civil proceeding, the matter of costs and intervenor
17 funding. We would have jurisdiction to deal with
18 those, but nothing else?

19 MR. HEINTZMAN: Absolutely. But the
20 point is here that you may take into consideration --
21 and that is what we say in this factum. You may take
22 into consideration in exercising that function, in
23 making that decision to look at what the government is
24 offering you.

25 The government obviously believes that

1 absent the continuation of some sort of inquiry it is
2 not in the public interest that this hearing terminate.
3 I mean, that seems to me to be as clear as crystal.

4 So the government for political policy
5 and other reasons is saying, for heaven's sake, we have
6 got to preserve and make useful what has happened
7 before this Board. So that is a very powerful
8 statement of the public interest to you, a statement
9 that you should seize upon before you make your
10 decision to terminate the hearing because it may
11 influence your decision.

12 If you are able to come to appropriate
13 terms and conditions with the government which will
14 fully, fairly and expeditiously deal with the matters
15 before this Board then, as we say here, you may well be
16 influenced. We don't agree we it, we don't condone it,
17 but we are here to say it is up to you to make the
18 decision, not up to Ontario Hydro.

19 If the Ontario government had said
20 nothing to you, had said you are out of here, that is
21 the end of it, you might have a different view as to
22 whether you should allow Ontario Hydro to withdraw its
23 application.

24 We say take that into consideration
25 before you make your decision, get those terms -- if

1 you want to do this, if you want to do this inquiry
2 process there is a good way of doing it -- and we are
3 suggesting how you might want to do it. Presumably if
4 there is a good way you will be more inclined.

5 We are saying take into consideration the
6 terms and conditions and the procedures in addressing
7 the public interest in having this hearing terminated.
8 That may influence you one way or the other. But think
9 of all those things before you make your decision to
10 permit Ontario Hydro to terminate the hearing.

11 Now, at that point I would go into -- I
12 will not address Section 7(3) because Section 7(3) we
13 say would involve you in a different procedure.

14 We would suggest that if Section 7(3) has
15 any application -- and we suggest it does not, and I
16 want to be very clear that absent -- as I say in
17 paragraph 31 of my factum, if this Board does not issue
18 a decision terminating this hearing it will be AECL's
19 position that this hearing has not terminated in
20 accordance with law. So it is our fundamental position
21 that that is required or this hearing is not ended.

22 Now, under Section 7(3), if you wanted to
23 use that vehicle, then you could say, all right,
24 Ontario Hydro, we are going to put your application --
25 we are going to hold it in abeyance. We are going to

1 go into this inquiry process for the purpose of
2 advising the Minister as to whether she should permit
3 the termination of this hearing.

4 Now, I think that that is a wrong
5 position in law and we will so assert, but you can get
6 to the same end perhaps by going through the inquiry
7 process before you terminate this hearing as you can by
8 being given jurisdiction out of a decision terminating
9 this hearing. So we have said that that other approach
10 is available; in our submission it is an erroneous one
11 in law, but it may accomplish the same result.

12 I think those are my submissions unless
13 you have some further questions.

14 THE CHAIRMAN: On the issue of whether
15 leave is required to the proponent to withdraw its
16 application are there any of those who wish to make
17 submissions who support Mr. Heintzman's view generally
18 that leave is required, those who think that leave is
19 required? Anyone who intends to make submissions that
20 takes that view?

21 All right. Then I will just go down the
22 line. Mr. Shepherd, do you want to make submissions on
23 this?

24 MR. SHEPHERD: Mr. Chairman, I will be
25 brief, just limiting myself to this question of who has

1 the legal right to do what here.

2 My concern is that we may have a
3 situation of good cases making bad law, and I would ask
4 this Board to be careful about the extent to which it
5 has to decide this.

6 It is clear, I think, that somebody has
7 the right to end this. It might be Ontario Hydro, it
8 might be the Minister, it might be the Board, it might
9 be some combination in some particular order.

10 I think it is clear. We know that
11 Ontario Hydro wants to end it. I don't think it would
12 take much to find out whether the Minister wants to end
13 it. And I was astonished to hear my friend Mr.
14 Heintzman say that he thinks the Minister definitely
15 doesn't want to end it because certainly I read her
16 letter and I thought that she was saying, yep, it's
17 over.

18 But we could find that out real fast.
19 And that leaves only this Board.

20 Now, I suppose it is conceivable that
21 this Board could say despite the fact that the
22 government doesn't want us to deal with this any more
23 and the proponent isn't going to do whatever we tell
24 them to do we still want to hear this. By gall, we
25 were asked to look at planning and we are going to do

1 it.

2 I suppose that is conceivable, and I
3 think it may be worthwhile for this Board to spend a
4 few minutes and say, is it possible that if we have the
5 jurisdiction we would decide that? And if you do that,
6 you say yes, it's possible, then I think you have to go
7 into the whole legal question of then do you have the
8 power to make that decision?

9 But I think it may be sufficiently
10 obvious to this Board that it will not seize that
11 jurisdiction in the face of the opposition of not only
12 the government and the proponent but also, as you know,
13 most of the parties.

14 It may be sufficiently obvious that this
15 Board can say whoever has the power to end it everybody
16 seems to be in agreement that it should be over, and
17 this may not be the appropriate place to decide the
18 legal question. It is not necessary, and maybe it
19 shouldn't be done.

20 Those are my submissions, Mr. Chairman.

21 THE CHAIRMAN: I guess that the issue
22 that Mr. Heintzman emphasized - and perhaps I should be
23 addressing him about it - is whether this has to be
24 done by decision or not.

25 If no leave is required, then you might

1 say that the very withdrawal ipso facto terminates the
2 hearing and nothing is required on the part of the
3 Board to implement that; the hearing just stops,
4 subject of course to costs and intervenors funding.
5 And there is nothing that the Board can do about that,
6 other than perhaps make a declaration that the hearing
7 is over just so the paperwork is in order.

8 But, of course, if there is a decision
9 then that has other implications because decisions are
10 subject to review and other processes can then be
11 instituted for that.

12 MR. SHEPHERD: Mr. Chairman, I agree with
13 you. Indeed, it is an interesting legal question. I
14 guess in a different situation I would say this is a
15 debate that should take place and a legal question that
16 should be decided.

17 I guess my concern is that while there is
18 no stare decisis in the Environmental Assessment Board
19 the decision of this Board on this legal point, if it
20 is made, will be very influential, and, therefore, in
21 order to do it I think this Board has to take
22 cognizance of the broad range of situations in which it
23 could be applied.

24 For example, will your rule apply in a
25 proper way in a planning hearing in which clearly only

1 the public interest is on the table - there is no lis
2 between parties except perhaps my friends at AECL -
3 equally to the private company that wants to build a
4 hazardous waste facility and comes up one day and says,
5 you know, we can't take this anymore, we are history.
6 Should the same process apply?

7 I guess I am asking you -- I mean, unless
8 you are willing to embark on that inquiry and have the
9 full debate over what the legal rules should be and how
10 it should apply in all cases then I think it is going
11 to be very difficult for you to make the decision in a
12 narrow way, narrow enough to keep the options open
13 later.

14 So what I am suggesting is if you don't
15 have to make the decision, don't make it.

16 Thank you, Mr. Chairman.

17 THE CHAIRMAN: Mr. Castrilli?

18 MR. CASTRILLI: Thank you, Mr. Chairman.

19 I will be brief.

20 While the matter is not entirely free
21 from doubt, it would appear that Section 7(3) governs
22 the basis upon which a withdrawal of an environmental
23 assessment may occur, and the remainder of the statute,
24 in particular the remainder of part 2 of the statute,
25 is silent on any other basis or decision-maker making

1 the decision with respect to withdrawal with or without
2 terms and conditions.

3 I would just note for you, Mr. Chairman,
4 at paragraph 7 of the AECL factum Mr. Heintzman refers
5 to Sections 6 through 11 of the Act dealing with the
6 necessity to file an environmental assessment and
7 procedures relating to such an assessment.

8 I would submit to you, Mr. Chairman, that
9 you have to look at the entirety of part 2 of the
10 Environmental Assessment Act which commences at Section
11 5, and you will note the heading is "Acceptance
12 Amendment Approval", and you must really consider the
13 entirety of part 2, which goes all the way to Section
14 17. No place else except in Section 7(3) of the
15 Environmental Assessment Act do you find the subject
16 matter of withdrawal being dealt with. So I think you
17 ought to take that into account and you ought not to
18 limit your inquiry, as Mr. Heintzman suggests in
19 paragraph 7 of his submissions, to just a consideration
20 of Sections 6 through 11.

21 I think as the submissions of Ontario
22 Hydro have already made clear, and I believe the
23 submissions of the government as well which I guess you
24 will soon hear, I don't believe that Section 4 of the
25 Statutory Powers Procedure Act is relevant in the

1 circumstances. I therefore also don't believe that
2 Section 18(26) of the Environmental Assessment Act is
3 relevant either.

4 In the circumstances, those are my
5 submissions unless you have any questions.

6 THE CHAIRMAN: Thank you, Mr. Castrilli.
7 Mr. Poch?

8 MR. D. POCH: Mr. Chairman, I have not
9 attempted to parse the statute in any detail. I would
10 suggest that if the concern is if you were to write a
11 decision it could then trigger appeal, review, what
12 have you, I think if AECL's intent -- they can
13 simply -- they would simply seek to review your initial
14 decision on statutory interpretation. In any event, we
15 may not be able to avoid that.

16 I would offer the following comments.
17 This is not a Royal Commission; it is an application
18 for approvals. Even if we accept Mr. Heintzman's logic
19 we can't imagine in these circumstances that the Board
20 would decide to hold Hydro hostage.

21 This is not a case of some proponent on
22 the eve your final decision saying, I think it is going
23 to 'go agin me', I'm getting out, I'll shop for another
24 board, in which case that would be clearly an intent to
25 abuse the process, and presumably that behaviour would

1 have to be curtailed in some fashion.

2 Even then, it might be sufficient that it
3 could be dealt with through the costs mechanism or
4 through a term and condition imposed by either yourself
5 or the Minister and saying you have to stay away, you
6 you can't reapply for a certain number of years.

7 Now, I do in fact think there has -- as
8 you will hear this afternoon perhaps, I do in fact
9 believe there is an analogous abuse going on here that
10 ought to be curtailed, but I leave that for the moment.

11 As to Mr. Heintzman's comments on what
12 the public interest is and how the government has
13 expressed itself I think we must presume that the
14 government has consciously allowed Hydro to withdraw.
15 It has the power since the amendment of the Power
16 Corporation Act to intervene in Hydro's decisions. It
17 has chosen not to do so, and I think that that can be
18 taken as a given.

19 To continue this hearing is no small
20 affair. The estimates are anywhere from \$30- to \$50-
21 million would be spent when you count the Board's own
22 costs, Hydro's own costs, in addition to the funding
23 and costs that might be award and in addition to the
24 private funds that might be awarded.

25 So I think it would be an extraordinary

1 case where a board would ultimately decide to force on.
2 Therefore, we are inclined to agree with Mr. Shepherd
3 that you may wish to hear Mr. Heintzman's submissions
4 on what terms or conditions or why you should continue
5 with the hearing. We are reasonably confident you will
6 find that it is not a case where you would force Hydro
7 on.

8 You could issue such a decision with the
9 preamble that you have not found it necessary --
10 assuming you reach that conclusion, you have not found
11 it necessary to decide the jurisdictional matter, and
12 in essence, if that is indeed your ultimate conclusion,
13 you will not have to decide this point in jurisdiction.

14 THE CHAIRMAN: I don't quite follow why
15 we won't have to decide it. We are going to have to
16 deal with it one way or the other. We are either going
17 to have to say, Hydro has the untrammelled right to
18 withdraw, subject to whatever application 7(3) may
19 have, or we have got to decide they need leave, in
20 which case we have to decide whether we would give them
21 leave or not.

22 MR. D. POCH: Well, Mr. Chairman, if you
23 go on to hear Mr. Heintzman's submissions on whether or
24 not to give leave or to give leave subject to certain
25 terms and conditions - I have a hunch his submissions

1 are rolled together in that regard - and if you do
2 after hearing -- in other words, reserve on this
3 question of jurisdiction, hear the submissions,
4 assuming you are required to give leave for withdrawal
5 or you do have jurisdiction to impose terms and
6 conditions whether or not you are required to give
7 leave for withdrawal, if you come to the conclusion
8 that if your leave is required you would indeed grant
9 it then you need not determine -- you can issue a
10 decision in those terms.

11 THE CHAIRMAN: Oh, I understand that.

12 MR. D. POCH: And that is all I am
13 saying.

14 THE CHAIRMAN: But that is still a
15 decision nonetheless. You could assume that leave was
16 required but decide that you would give it so that
17 there is no --

18 MR. D. POCH: I am suggesting, Mr.
19 Chairman, that it might be appropriate to proceed to
20 hear his arguments, Mr. Heintzman's arguments on why
21 not to grant leave because I for one --

22 THE CHAIRMAN: I thought I heard his
23 arguments why not to grant leave.

24 Have I not heard your arguments why not ,
25 to grant leave? I thought I had. I thought I heard a

1 lot of good arguments why not to grant leave.

2 [10:30 a.m.]

3 MR. HEINTZMAN: Grant leave to terminate
4 the hearing?

5 THE CHAIRMAN: Yes. You made those
6 arguments.

7 MR. HEINTZMAN: I made the arguments
8 that AECL does not consent to a termination of the
9 hearing. I have not made any arguments going to the
10 merits as to whether you should terminate. In my view,
11 and I am prepared to do that, I thought we weren't
12 addressing that issue.

13 THE CHAIRMAN: I thought you had done
14 that.

15 MR. D. POCH: Mr. Chairman, the other
16 alternative is simply for you to find, if you do find,
17 that you don't need to grant leave, but in the event
18 that you do, you do so grant, having heard the
19 arguments for and against.

20 So all I am suggesting is that if that
21 second conclusion is clear to you or is becoming clear
22 to you, then you can avoid -- I am agreeing with Mr.
23 Shepherd, perhaps it might be prudent to avoid the
24 broader jurisdictional decision.

25 Thank you, Mr. Chairman.

1 THE CHAIRMAN: We have now been at this
2 for an hour and a half, so I think we will take a
3 break.

4 I would hope that if those who think we
5 might have leave, the right to grant leave, should also
6 address what terms and conditions those ought to be, if
7 any. I thought Mr. Heintzman had done that in
8 combination of his oral submission and his factum.

9 We will adjourn for 15 minutes.

10 THE REGISTRAR: Please come to order.

11 This hearing will recess for 15 minutes.

12 ---Recess at 10:31 a.m.

13 ---On resuming at 10:50 a.m.

14 THE REGISTRAR: Please come to order.

15 This hearing is again in session. Please be seated.

16 THE CHAIRMAN: Mr. Klippenstein?

17 MR. KLIPPENSTEIN: Thank you, Mr.

18 Chairman.

19 Pollution Probe will be making
20 submissions on the first issue. I will take no
21 position on the question of whether or not this Board's
22 order is required to terminate the hearing. I may well
23 agree with AECL on that point, and indeed, I suspect
24 that is the case for most courts and tribunals.

25 In my respectful submission, assuming

1 that's the case for now, there is a large gulf between
2 the purpose of such requirement for permission to
3 protect with respect to issues of costs and like
4 issues, with, on the other hand, the ability to
5 transform the hearing and continue it in some other
6 form. And that second process, in my respectful
7 submission, is that suggested by AECL, and in my
8 submission, there is a chasm between those two and the
9 propositions of AECL would take this panel off in a new
10 direction.

11 THE CHAIRMAN: Maybe I misunderstood, but
12 AECL's first wish would be that the hearing continue to
13 its conclusion with or without the participation of the
14 proponent and others; secondly, if that were not the
15 result, that the second process, if I can call it that,
16 would be subject to certain terms and conditions or
17 rules or process, et cetera.

18 Is that correct, Mr. Heintzman?

19 MR. HEINTZMAN: That's exactly correct.

20 MR. KLIPPENSTEIN: Well, if I may address
21 the first proposition, which is that the hearing
22 continue without the agreement of Hydro, shall I say,
23 or without permitting Hydro to withdraw.

24 In my submission, that has the same
25 effect as the second proposal. In either case, this

1 panel is effectively ordering parties to proceed on a
2 very large endeavour against their wishes. And in my
3 respectful submission, a decision of this Board to
4 embark on that departs from the statute, the cases, and
5 the practice of courts and other tribunals.

6 The effect is the same and that is that
7 parties will be ordered to present evidence on issues
8 of concern to this Panel.

9 If I may refer on that issue --

10 THE CHAIRMAN: If the second process were
11 initiated, that is a separate and distinct process from
12 this Board. It may deal with some of the same issues
13 but it is a separate and distinct process; is it not?

14 MR. KLIPPENSTEIN: I draw the distinction
15 at the point where parties are ordered or potentially
16 ordered to present evidence.

17 THE CHAIRMAN: As I understand it, as
18 presently proposed by the government, they are
19 proposing an advisory committee couldn't order any one
20 to do anything if they didn't want to, I wouldn't
21 think.

22 MR. KLIPPENSTEIN: I see that
23 respectfully as a different type of process, and again,
24 if the process embarked upon is where no one is ordered
25 to do anything, my submissions do not apply to that in

1 the specific point.

2 THE CHAIRMAN: It did not order but they
3 may be asked to request but they don't have to be
4 complied with. You are quite right, as I understand
5 it, it's a completely different process.

6 MR. KLIPPENSTEIN: Well, in my
7 submission, the border is being blurred on that
8 particular issue, and one leads to the other. At the
9 extreme this Panel may proceed with an inquiry in which
10 it orders nobody to do anything.

11 THE CHAIRMAN: It has no power to order
12 anybody to do anything.

13 MR. KLIPPENSTEIN: Correct. But let me
14 take the case of this inquiry continuing.

15 Upon a Board decision that Hydro may not
16 withdraw its application, and furthermore, that this
17 Panel will continue with this inquiry, the choices
18 faced by the parties, of course, are not to participate
19 in any way for reasons of cost, perhaps for reason of
20 perceived fairness or unfairness.

21 In my submission, this Panel has the
22 jurisdiction to do that. Now, I think that raises very
23 obvious concerns of fairness, adequacy of the decision,
24 but in my submission the jurisdiction is there to
25 continue, if no orders are made for witnesses, for

1 evidence, for parties and so on.

2 Now, I do not read AECL's position in
3 that light. If I may refer to you page 12 of the
4 submission, paragraph 27, the second sentence, AECL's
5 submission states that:

6 In effect, the Board ought to
7 establish procedures whereby the Board
8 questions the intervenor witnesses who
9 witness statements have been filed, and
10 decides which witnesses it wishes to
11 question; and the Board hears the oral
12 argument it wishes to hear, leaving the
13 parties the right to file such written
14 argument as they deem appropriate.

15 THE CHAIRMAN: That is describing I think
16 the federal process.

17 Let me just get something clear in my own
18 mind. If this hearing should terminate and another
19 process is instituted, two things: One, I think they
20 are entirely separate processes but there may be
21 obviously some inter-relation in the sense that
22 evidence in the earlier process may be subject to the
23 consideration and so on. But the persons performing
24 the task are not functioning as the Environmental
25 Assessment Board at that time; they are functioning as,

1 I suppose, private citizens being asked to advise the
2 government.

3 I take it - and we are going to get into
4 this later - there are some problems that some parties
5 have about that. But that's the way it seems to me it
6 is right now.

7 MR. KLIPPENSTEIN: If that is the
8 position being argued by AECL I have no problem with
9 it. I do not believe that is clear from the
10 submissions, and in fact a different implication is
11 suggested, and I would again refer you to page 11 to
12 look at the heading on that particular section, which
13 says:

14 If the Board is inclined to terminate
15 this hearing, what terms ought it to
16 insist upon?

17 That leads to the reconstitution at which
18 the Board will decide which witnesses it will hear.

19 I have no problems if there are two
20 distinct steps. One consists of a Board decision to
21 terminate the hearing, and then as a separate question
22 not under the EA Act, what to do about an inquiry. I
23 have no problem with that separation.

24 I would have concerns about both of those
25 steps. My fear is that those are being inflated here

1 and I would suggest that that is a grave error.

2 THE CHAIRMAN: What about inflated did
3 you say..

4 MR. KLIPPENSTEIN: Inflated or merged and
5 a proper recognition of the distinction is being lost.

6 THE CHAIRMAN: That's what I was trying
7 to make, the distinction when I was dialoguing with
8 you. That's the way I see it now.

9 MR. KLIPPENSTEIN: Let me address that
10 point by using an example.

11 AECL is requesting a Board decision to
12 terminate the hearing. Let me look at what that Board
13 decision will include. Will it include any reference
14 to further inquiry by this Panel? If it does, it
15 raises grave concerns. If it does not, in my
16 respectful submission it would deal with procedural
17 matters such as costs, winding down the hearing, and in
18 my respectful submission, that raises no major issue
19 since that is quite properly within the purview of
20 courts as an aspect of proceeding with the hearing.

21 However, if that other term is included,
22 some provision about a further inquiry, my questions
23 would be what is the question?

24 Under the Act and under the present
25 hearing, the question is, is the proposed environmental

1 assessment adequate? Would that be the question under
2 this termination decision?

3 Another question would be: Who are the
4 parties? Is it limited to the parties to the present
5 hearing as opposed to anybody that the Board would
6 choose to invite?

7 Again, another question is: Does the
8 Board have the power to require parties to appear?
9 Does the Board have the power to require experts to
10 appear?

11 In my submission, another question is
12 costs, who pays? Does this Board then have the
13 authority to order a particular party to participate at
14 its own cost?

15 All of those questions cannot be avoided
16 if this termination decision includes any aspect of a
17 continued inquiry.

18 THE CHAIRMAN: And in your submission it
19 shouldn't contain such an aspect?

20 MR. KLIPPENSTEIN: That's my submission.

21 If I may refer to one of the cases cited
22 by my friend, re Carfrae Estates, on page 544, and the
23 top paragraph, the second full sentence --

24 THE CHAIRMAN: Just a moment, I'm sorry.
25 I have so much paper here. Here, I have got it. Thank

1 you.

2 544?

3 MR. KLIPPENSTEIN: Yes.

4 The second full sentence on the page
5 reads:

6 "In other words the implication of the
7 giving of that notice is that the
8 tribunal has become seized of the issue
9 and has a right to protect its own
10 interest and those of other persons."

11 In my submission, that is the principle
12 which determines the continued power of the Board to in
13 its decision govern the termination of a hearing. It
14 is a right to protect the interest of itself and those
15 of other persons against prejudice.

16 If you proceed down on the same page to
17 the second last full paragraph which begins, Thus. The
18 court says:

19 "Thus, we see that in the light of the
20 real prospect of prejudice to others, we
21 cannot read the statute as creating a
22 unilateral right to withdraw in a
23 landlord at any point of the
24 proceedings."

25 In my respectful submission, once this

1 Board in a termination decision goes beyond dealing
2 with prejudice and moves on to that further subject of
3 a further inquiry, it is proceeding beyond what the
4 cases in the statute justify.

5 On that point I would again refer you to
6 AECL's submissions on page 12 in which the suggestion
7 by my friend under paragraph 28(A) is that the Board
8 must insist that all subject matters presently before
9 the hearing should be dealt with by the Panel in the
10 inquiry process.

11 Now, first of all, that is an extremely
12 broad proposed inquiry.

13 Secondly, the question arises why this
14 Panel should be limited to existing matters before the
15 present hearing. What is to draw the line there?

16 We have now left the environmental
17 assessment proposed by Hydro as a touchstone for what
18 the issues are. Why not go further?

19 In my respectful submissions, those are
20 the sorts of questions this Panel will not be able to
21 avoid once it has proceeded beyond the environmental
22 assessment that Hydro will now have withdrawn. And
23 again, with respect to your earlier concerns, these
24 issues only arise if the Board's termination decision
25 goes beyond matters such as cost in winding down the

1 hearing on proceeds further.

2 Those are my submissions with respect to
3 the termination of this hearing. I will make very
4 brief submissions with respect to terms and conditions
5 on that more limited range of issues which I identified
6 such as costs.

7 First of all, I would respectfully
8 suggest that this Panel consider solicitor and client
9 costs for all or perhaps all parties considering the
10 circumstances of the withdrawal.

11 Secondly, this Board should consider the
12 possibility that an abusive process in the future
13 should be prevented by imposing a certain time limit
14 within which the proponent cannot return to this Panel,
15 or this Board, with a similar or identical proposal.

16 THE CHAIRMAN: That wouldn't encompass
17 the hydraulic applications, I take it, that are going
18 to go site-specific, or have already --

19 MR. GREENSPOON: They are already filed.

20 THE CHAIRMAN: Or are already filed.

21 MR. KLIPPENSTEIN: I have no submissions
22 on that specific issue.

23 Subject to any questions the panel may
24 have, those are my submissions.

25 THE CHAIRMAN: Do you have any suggestion

1 about what the time limit ought to be?

2 MR. KLIPPENSTEIN: I beg your pardon?

3 THE CHAIRMAN: Do you have any
4 suggestions of what the time limit ought to be?

5 MR. KLIPPENSTEIN: No, I have no
6 submissions on that.

7 THE CHAIRMAN: Thank you very much, Mr.
8 Klippenstein.

9 MR. KLIPPENSTEIN: Thank you, Mr.
10 Chairman.

11 THE CHAIRMAN: Mr. Mattson?

12 MR. MATTSON: Thank you, Mr. Chairman.

13 I would like to first deal with the issue
14 that you set out before the break, and that's the issue
15 with respect to leave and whether leave is required of
16 this Board.

17 Mr. Chairman, I would put it to you that
18 if you are decide on the issue of whether Ontario Hydro
19 needs leave to withdraw the undertaking, that it goes
20 without saying that you would have already made a
21 determination that Section 7(3) of the Environmental
22 Assessment Act, would not and does not apply in this
23 situation, I take it.

24 And Mr. Chairman, the submissions of
25 AECL's counsel with respect to 7(3) I am not 100 per

1 cent sure of, but if you look at Section 7(3), I agree
2 fully with with Mr. Castrilli that you can't refer
3 simply to Sections 6 to 11 as giving context to Section
4 7(3), but rather Part 2 of the Environmental Assessment
5 Act, acceptance, amendment and approval, and that runs
6 in Section 5 to Section 12.

7 Section 7(3) speaks of a withdrawal or
8 amendment prior to notice, and then uses the word and
9 thereafter may withdraw or amend an environmental
10 assessment. And the word "thereafter" is not in any
11 way limited by time or words such as prior to the
12 hearing.

13 [11:12 a.m.]

14 Mr. Chairman, I think there is a good
15 reason for that, and I think that it should be
16 considered by the Board, and that is that the
17 Environmental Assessment Act is concerned with ensuring
18 good planning and that approval is needed prior to the
19 plan being implemented. The Act itself does not have
20 control or jurisdiction over the actions themselves
21 once approved, Mr. Chairman.

22 For example, once a certificate of
23 approval is given by the Minister and if Ontario Hydro
24 is not in compliance with your order that is not
25 something that the Environmental Assessment Act or the

1 Environmental Assessment Board has jurisdiction over.
2 That comes under the Environmental Protection Act, and
3 that is subject to another Act.

4 Certainly, the Board doesn't have any
5 jurisdiction over the undertaking prior to it coming
6 before the Board. That is purely the onus of the
7 proponent. They put together the undertaking in the
8 plan, and again, it comes before you as the undertaking
9 and it needs approval before it can go ahead.

10 So the example of the rent control case
11 that my friend referred you to obviously there is a
12 situation there where there is a piece of property, a
13 building, that rent control has jurisdiction over
14 whether or not it is this landlord or the next landlord
15 or this tenant or the next tenant who moves in. It is
16 an actual piece of property that the rent control
17 authority has and maintains jurisdiction over.

18 That isn't the case with respect to the
19 Environmental Assessment Act.

20 With respect to the Environmental Appeal
21 Board, again it is an order, it is an order that is
22 before the Board. It is dealing with actions that need
23 to be taken or are being in fact ordered to be done,
24 and the Environmental Appeal Board has the jurisdiction
25 over that order and over those actions. Again, it is

1 the distinction made between that and the Environmental
2 Assessment Board.

3 Mr. Chairman, with respect to a decision
4 it is clear that Ontario Hydro cannot go ahead with the
5 undertaking or with any of its plans without your
6 approval. So ultimately if they ever in the next 25
7 years plan on doing and carrying out an undertaking
8 they need a decision, they need this Board's approval.

9 The fact that you may not give it now is
10 not important. The fact is you will have to give that
11 decision, you will have to give Ontario Hydro that
12 approval at some point.

13 So if Ontario Hydro withdraws the
14 undertaking, which is defined in the Act as an
15 enterprise or activity or proposal, plan, program, it
16 is their undertaking, that is what they are asking for
17 approval for. They have now withdrawn it, and
18 obviously if they plan to go ahead in the future they
19 are going to have to resubmit it, and they are going to
20 need a decision. But Ontario Hydro doesn't need a
21 decision now.

22 So, Mr. Chairman, on that point I think
23 that I am saying that the undertaking itself, no matter
24 what it contains and no matter how Ontario Hydro
25 defines it, ultimately, according to the Environmental

1 Assessment Act, will need approval from the
2 Environmental Assessment Board before it can ever be
3 instigated or implemented.

4 Now, Mr. Chairman --

5 THE CHAIRMAN: I'm not sure I understand
6 what your bottom line is. You start off by saying, I
7 think, Section 7(3) is applicable--

8 MR. MATTSON: That's correct.

9 THE CHAIRMAN: --in your submission.

10 MR. MATTSON: Yes, I'm saying it is
11 applicable and I'm saying --

12 THE CHAIRMAN: Wait a minute. Just a
13 minute.

14 MR. MATTSON: Yes?

15 THE CHAIRMAN: And then I didn't quite
16 follow what the implication of that was on what we are
17 doing here.

18 What do you see? I mean, how should we
19 be treating Hydro's withdrawal of the environmental
20 assessment in your submission? I don't quite
21 understand.

22 MR. MATTSON: Well, as I understand my
23 friend from AECL's position is that Section 7(3) does
24 not apply once the hearing has begun.

25 THE CHAIRMAN: But what is your position?

1 MR. MATTSON: My position is that yes, it
2 does apply.

3 THE CHAIRMAN: Given that -- wait a
4 minute.

5 Given that Section 7(3) does apply, which
6 I think is what you said--

7 MR. MATTSON: Yes.

8 THE CHAIRMAN: --what is your submission
9 about what we should be doing here, if anything?

10 MR. MATTSON: My submission, Mr.
11 Chairman, is that Ontario Hydro has the right to
12 withdraw, subject to terms and conditions of the
13 Minister, and that they have done so, and that the
14 jurisdiction of this Board has ended.

15 THE CHAIRMAN: So you are saying ipso
16 facto the hearing is over.

17 MR. MATTSON: That's correct.

18 THE CHAIRMAN: Is that your position?

19 MR. MATTSON: Yes. And I am saying that
20 AECL's argument that it doesn't apply -- I am first
21 putting it in the context of Section 5(12) of part 2 of
22 the Act, and I am also suggesting to you that Section
23 7(3) makes sense in light of the context of the statute
24 and what the statute sets out to accomplish, and that
25 Ontario Hydro cannot go ahead with this undertaking at

1 any time without a decision of this Board.

2 THE CHAIRMAN: I understand. I
3 understand that.

4 MR. MATTSON: All right. So just with
5 respect to AECL's submission that a decision needs to
6 be made, a decision will be made, has to be made before
7 Ontario Hydro can take any action, but it doesn't have
8 to be made now because the undertaking has been
9 withdrawn.

10 If I am wrong, Mr. Chairman, and you find
11 that Section 7(3) does not apply to the withdrawal of
12 the proponent, then, Mr. Chairman, a number of
13 questions arise that I would like to bring to your
14 attention, and that is, of course, what is the
15 undertaking then that this Board -- if we go ahead with
16 this hearing and if my friend is correct that you need
17 a decision to be made by this Board, I think we need to
18 know what it is that the undertaking consists of.

19 We know that the proponent has removed
20 all requirements for approvals and then --

21 THE CHAIRMAN: He's done more than that,
22 hasn't he? He has removed the environmental assessment
23 itself.

24 MR. MATTSON: Yes, but if you find that
25 he can't do that without a decision from this Board

1 then I am really interested in knowing what it is the
2 decision of this Board would be made with respect to.

3 Obviously, the undertaking is no longer
4 before the Board as defined by the Act because there is
5 no proposal or plan being put forward by the proponent
6 any longer as they define it.

7 So in order for a decision or in order
8 for argument to be made I guess the issue that I think
9 needs to be determined is: What are we arguing about?
10 And at this point anyway, Mr. Chairman, I wasn't sure
11 of Mr. Heintzman's argument on that point, what it is
12 that he felt was still to be determined and what he
13 felt this Board needed to make a decision with respect
14 to.

15 If, Mr. Chairman, it is the position of
16 the Board that terms and conditions can be imposed then
17 I would ask you to consider the following.

18 First of all, there was a motion
19 scheduled to go ahead on Tuesday. There were a number
20 of different positions held by a number of different
21 parties with respect to why the hearing should be
22 terminated.

23 Ontario Hydro did not file a position on
24 any of those grounds so we don't know what the
25 proponent's position was with respect to any of those

1 arguments, and, of course, there was no determination
2 made by this Board with respect to whether those
3 arguments had any validity and would in fact have
4 resulted in a decision of the Board to terminate the
5 hearing.

6 Given that, Mr. Chairman, it is difficult
7 to propose terms and conditions with respect to
8 anything other than costs. There were grounds such as
9 Energy Probe's that the hearing was incomplete, that
10 there were matters outside environmental assessment put
11 forward before you that are occurring, that are
12 affecting Ontario Hydro's planning, plans.

13 There has been indication in the press
14 from the new chairman of Ontario Hydro that a task
15 force has been set up to determine the future of
16 Ontario Hydro, quotes that Hydro is in a state of
17 crisis and that Hydro is even considering what was
18 earlier considered an unreasonable alternative, and
19 that is the option of privatization.

20 This information and these task forces
21 and the information and analysis and documentation that
22 they will be working from obviously are going to affect
23 any new plans that Ontario Hydro makes in the coming
24 months, and that information isn't before this Board.

25 So at this stage, Mr. Chairman, I think

1 that it is fair to say that terms and conditions put by
2 this Board on Ontario Hydro at this time would only
3 serve to fetter any decisions that may be made by
4 Ontario Hydro in the coming months that rest or rely on
5 information that isn't before this Board.

6 Obviously, there won't be a determination
7 made with respect to that motion, but I just wanted to
8 make it clear that that was our earlier position, and
9 it is for that reason that we don't believe terms and
10 conditions that would in any way fetter Ontario Hydro's
11 plans and future plans should be made, and obviously
12 those future plans would then have to come before this
13 Board, and it would be up to the Minister and the
14 Environmental Assessment Board to indicate to Ontario
15 Hydro what the last two years and all the evidence that
16 has come before you, what relevance that information
17 will have to any future plan Ontario Hydro brings
18 before this Board.

19 Those, Mr. Chairman, are all my
20 submissions.

21 With respect to costs I don't have any
22 submissions on that. I didn't believe that right now
23 is the appropriate time to discuss that, and I take it
24 that there will be another opportunity.

25 THE CHAIRMAN: Yes, there will be.

1 MR. MATTSON: Thank you.

2 THE CHAIRMAN: Ms. Marlatt?

3 MS. MARLATT: Mr. Chairman, I'll be
4 brief. We adopt the position taken by Mr. Castrilli
5 with respect to the jurisdiction issue under Section
6 7(3) of the Environmental Assessment Act. I don't
7 believe we have any submissions in addition to that.

8 THE CHAIRMAN: Thank you. Mr. Taylor?

9 MR. TAYLOR: Mr. Chairman, would it be
10 all right if I was held down until I have heard the
11 position of the Ministry for the government?

12 THE CHAIRMAN: No, the Ministry goes last
13 under our process.

14 MR. TAYLOR: Thank you, Mr. Chairman.

15 THE CHAIRMAN: You will get a reply
16 opportunity, you know. So there is no problem. You
17 are not being cut off.

18 MR. TAYLOR: Thank you, Mr. Chairman. I
19 did just in that respect want to be clear on the terms
20 and conditions aspect that I thought my friend might be
21 meeting.

22 Mr. Chairman and Members, I think in
23 essence there are three questions that are before the
24 Board today.

25 The first is: Does Ontario Hydro require

1 leave to withdraw; second, if yes, may the Board attach
2 terms and conditions; and thirdly, the issue of this
3 Advisory Panel. And I take it that the Advisory Panel
4 is an issue we will be dealing with subsequent to that,
5 so I would like to turn my attention to the first two
6 issues.

7 In that regard, if we examine this
8 question from a practical perspective I would submit
9 that the Board's jurisdiction in this regard, if any,
10 is really of not great consequence. If Ontario Hydro
11 advises that it intends not to proceed and it withdraws
12 its application then effectively the hearing is over
13 whether or not the Board so orders.

14 The only exception to that, with respect
15 of course, is with the issue of costs and other
16 procedural matters that the Board would want to
17 complete in order to wind up the hearing. I can only
18 presume that this Panel would make such an order in
19 disposing of the hearing in light of the reality of the
20 situation.

21 Of greater concern to my client is the
22 contention that this Board has jurisdiction to place
23 terms and conditions on the decision with regard to the
24 withdrawal from the hearing. It is our submission that
25 Section 4 doesn't apply, nor Section 7(3), and in

1 fact --

2 THE CHAIRMAN: Section 4 did you say?

3 MR. TAYLOR: Yes, Mr. Chairman.

4 THE CHAIRMAN: You mean of the Statutory
5 Powers Procedure Act?

6 MR. TAYLOR: Yes, Mr. Chairman. I
7 apologize. I should have been clear on that.

8 In our view nor is it reasonable that
9 where an application is withdrawn part way through the
10 proceedings and prior to the submission of the
11 intervenors' evidence that this Board should place
12 terms and conditions on any decision to dispose of the
13 hearing.

14 The Board is simply not in a position to
15 make such an order when it has only heard a portion of
16 the evidence. Again -- and I say that with the only
17 exception being in terms of costs, and procedural
18 matters of that nature.

19 Therefore, it is our submission that
20 although it may be technically necessary for the Board
21 to order the termination, in every practical way this
22 hearing is over, and it was over with Hydro's
23 announcement earlier this week.

24 Now, it is our respectful submission with
25 regard to terms and conditions that the Board does not

1 have that jurisdiction except as I have outlined on
2 costs.

3 If the Board were to determine that it
4 does have jurisdiction and it does wish to consider the
5 issue of terms and conditions, then I would have to
6 respectfully request an adjournment for at least a week
7 in order that I can seek instructions from my client
8 concerning this matter. The short adjournment that we
9 have had to date was simply inadequate for me to get
10 those kind of instructions.

11 Mr. Chairman, those are my comments at
12 this point in time, subject to whatever questions the
13 Board may have.

14 THE CHAIRMAN: Thank you, Mr. Taylor..
15 Mr. Mark?

16 MR. MARK: Thank you, Mr. Chairman.

17 I'll try to be brief. My frustration
18 with trying to get this hearing ended without a lot of
19 undue surrounding confusion, it is becoming clear I'm
20 not very successful in that.

21 Mr. Chairman, I think obviously the first
22 question and the seminal question is whether Section
23 7(3) applies. Mr. Heintzman, I think it is clear, has
24 to resort to some considerable gymnastics to support
25 the argument that it doesn't apply. In our submission,

1 it does.

2 I adopt what Mr. Castrilli has said, that
3 there is on the face of it no temporal restriction on
4 the right granted by Section 7(3). Its placement in
5 the part of the legislation dealing with the entire
6 application and approval process, including the hearing
7 process, leads to an almost ineluctible conclusion that
8 it continues to apply through the hearing process.

9 But lest there be any doubt, Mr.
10 Chairman, I want to put before you one further aspect
11 of the section which in my submission makes that clear.

12 Mr. Heintzman's argument, you will
13 recall, is that once we have a hearing, once the matter
14 is required to be placed before the Board for its
15 consideration both the wording of the Act and I take it
16 its public policy position is that it would be bad
17 policy to permit it to be withdrawn.

18 But if you look at Section 7(2), Mr.
19 Chairman, 7(2), which is in the very same section as
20 7(3), permits any person - permits any person - by
21 giving a notice to require a hearing by the Board with
22 respect to the undertaking - to require the Board to
23 hold a hearing with respect to the undertaking;
24 identical, identical to the function performed by the
25 Minister of his own motion under Section 12(3):

1 require the Board to hold a hearing.

2 Yet Section 7(2) is precisely the one
3 followed by 7(3) which gives the proponent the right to
4 withdraw the undertaking, notwithstanding the referral
5 to a hearing by citizens' notice in 7(2).

6 So I say, if - if - the legislation
7 clearly provides that the proponent may withdraw in the
8 face of the requirement to hold a hearing initiated by
9 a member of the public, to use your words, Mr.

10 Chairman, ipso facto the proponent must be able to
11 withdraw the undertaking in the face of the requirement
12 to hold the hearing it had commenced by the actions of
13 the Minister.

14 There is in substance and in purpose and
15 in public policy no reason to distinguish between the
16 two situations, and it certainly makes it very
17 difficult, in my submission impossible, for Mr.
18 Heintzman to contend that Section 7(3) is intended to
19 deal with situations not involving the hearing process.

20 The wording on the face is clear, Mr.
21 Chairman, and I respectfully submit to you that the
22 Legislature has in its wisdom provided for withdrawal
23 of the application. Whether that is good policy,
24 whether that is bad policy is immaterial; the
25 Legislature has exercised its judgment in what are in

1 my submission clear and unequivocal terms.

2 If one accepts that 7(3) applies, Mr.
3 Chairman, then in my submission there is no further
4 action required, certainly by the Board but also by the
5 Minister, to effect the termination.

6 [11:30 a.m.]

7 The Minister is empowered to impose terms
8 and conditions by order, whether that must be done as a
9 condition of the withdrawal or whether it can be done
10 after the withdrawal was immaterial. The government we
11 are told has decided it wants not to do that. So they
12 haven't done it, it's a moot issue.

13 THE CHAIRMAN: I think all we know is
14 they haven't done it, I don't think we know what they
15 have decided.

16 MR. MARK: As I understand from counsel
17 for government, the government has no intention to take
18 any further steps or impose any terms and conditions.

19 If I am wrong, I would be grateful if I
20 could be corrected.

21 MR. HEINTZMAN: Mr. Moran said that the
22 Minister is not going to do anything. That's what he
23 said this morning, and I have ordered the transcript.
24 Anything.

25 MR. MARK: There we have it.

1 MS. PATTERSON: I thought it was a little
2 bit less clear than that. It was he didn't know that
3 she was going to do anything.

4 MR. MARK: Not for the first time, Ms.
5 Patterson, I have been trying to get the government to
6 tell us what they really want to do, and not even in my
7 capacity as counsel for my client, as a citizen I would
8 like to know. But I think we can take it as clear if
9 the government says, I have done nothing, I don't have
10 any plans to do nothing, they are not going to issue an
11 order imposing terms and conditions.

12 The point is simple. I think this is a
13 moot issue whether they have to do it before or after.
14 They haven't done it and it's quite that simple and
15 there is nothing in the section which requires an order
16 as to terms and conditions as a condition precedent to
17 the withdrawal.

18 And in any event, I agree with the
19 comments made previously I believe by somebody speaking
20 in favour of the termination of the hearing, the
21 government has clearly consented.

22 Mr. Heintzman is incorrect when he
23 suggests to you that the government in its letter
24 asking you to constitutes yourselves as an advisory
25 panel has indicated that as a condition of withdrawal

1 it wants some further inquiry. The opposite is
2 abundantly clear.

3 The government has said, if you accept
4 this invitation we would like you to do that.

5 If the government intended, as Mr.
6 Heintzman suggests, not to permit the withdrawal unless
7 there is some form of continued inquiry, it would have
8 said so.

9 It clearly in its letter understands that
10 the withdrawal is being affected whether you agree to
11 serve or not, or whether anybody else agrees to serve
12 or not. That is the one thing, to use Mr. Heintzman's
13 word, which is crystal clear.

14 Mr. Heintzman then relies upon Section 4
15 of the SPPA, Mr. Chairman. In my submission, on the
16 wording of the statute, I won't parse it in detail,
17 it's clearly permissive. As you indicated before, Mr.
18 Chairman, it does not even purport on its face to be
19 exhaustive of the methods of termination of a hearing.
20 Most obviously missing from the list is the Board
21 making a decision on the merits of the case and
22 disposing of it that way. And it not being exhaustive,
23 it clearly must be read, as the word "may" suggests, as
24 being permissive to permit consent dispositions of the
25 matter, with or without the Board's approval as the

1 case may be depending on the statutes, which might not
2 otherwise be permitted.

3 THE CHAIRMAN: Speaking personally, Mr.
4 Mark, I have a great deal of difficulty why the debate
5 about a decision. Obviously we have to make a
6 decision. Even if we make a decision that consent to
7 withdrawal is not necessary and the hearing is ipso
8 facto ended, that in effect is giving effect to your
9 interpretation of 7(3) and the consideration of the
10 cases relating to the withdrawal. Whatever we do, it
11 will be a decision.

12 MR. MARK: I agree with you. But I
13 rather took Mr. Heintzman's point as being something
14 slightly different.

15 I took his point as being that you can
16 look at Section 4 of the SPPA for support for his
17 proposition that -- he really says, you have to deal
18 with the question of termination on the merits, if you
19 will, you have to address yourself to the question is
20 it appropriate having regard to the interest of the
21 parties, public interest, public policy that we should
22 not continue with the hearing, as a opposed to the
23 issue which you suggest which is something saying, the
24 statute says they can withdrawal. Period. I think
25 that's the distinction Mr. Heintzman is rising and I

1 suggest to you Section 4 doesn't go any distance at all
2 towards supporting that position.

3 If we look at it from slightly a
4 different perspective, Mr. Chairman, I think it becomes
5 clear how in the result - and I say this with the
6 greatest of respect to my friend - the position
7 advocated is absurd.

8 You have already ruled in this case, you
9 have already ruled in this case as most people agree of
10 two things: (A) it's for the proponent to define the
11 undertaking, and (B), that the proponent can amend the
12 undertaking at will, but at some point the amendments
13 may be of such substance that the Board loses
14 jurisdiction to continue with the matter. So we have a
15 situation where they can define it, but they can amend
16 it to such an extent that the Board loses the
17 jurisdiction.

18 Now, without getting into the argument of
19 whether amendment to a nil undertaking is of such
20 magnitude as to result in that jurisdiction, I rather
21 suggest it would be, I am at a loss to figure out what
22 would be more drastic, but let's accept theoretically
23 that it could be, Mr. Heintzman's position to you is,
24 all right, they can amend and if they amend to a
25 certain extent the hearing should be terminated.

1 On the other hand, he says, it doesn't
2 matter how much they amend, they can withdraw the
3 bloody thing, but you have got to continue with the
4 hearing, you have your jurisdiction.

5 Those two propositions cannot stand side
6 by side.

7 If we accept the fact, as you have
8 already ruled and other cases have ruled, that at some
9 point significant changes can result in the hearing
10 having to be terminated, as a matter of principle it
11 cannot stand side by side with the proposition that you
12 must continue with the hearing regardless of how much
13 they change it, bend it, fold it, mutilate it or
14 withdraw it.

15 So in my submission, Mr. Chairman, it is
16 clear that as a matter of principle, it is for the
17 proponent to determine whether it withdraws, and if it
18 withdraws, the hearing terminates as a matter of
19 course.

20 Mr. Heintzman referred you to a number of
21 cases which he says stand for the proposition that the
22 applicant does not have the unlimited right to
23 withdraw. Of course I think we understand that that is
24 the situations where there isn't an express permission
25 for withdrawal as I say there is here.

1 But in any event, Mr. Chairman, I submit
2 to you those cases are quite distinct and would not
3 support Mr. Heintzman's position in any event.

4 The case he relied upon with respect to a
5 situation where the applicant wanted to withdraw, it is
6 important to bear in mind a very important distinction
7 in that case. And as I understand the case, once the
8 landlord had submitted the application, the Board of
9 its own motion could put in issue, in effect, make an
10 application with respect to the rents for the entire
11 building, even if that was not within the original
12 application by the landlord, the landlord started a
13 process, if you will, a public application became
14 commenced to settle the rents for the building, an
15 issue which was independent of who was the landlord at
16 any time and who was the tenant at any time. What the
17 Court there held, and I think it's clearly a different
18 situation, is it was simply no longer within the power
19 of the landlord to halt that process which had been
20 initiated by his application but was clearly
21 independent of it.

22 And the in rem distinction which Mr.
23 Heintzman read to us from the decision, while perhaps
24 too technical in legal terms, is an important one to
25 bear in my. It was that there was a decision which

1 affected the building and not just the parties to it.

2 But here the approvals are sought by Hydro.

3 Now undoubtedly in your consideration of
4 Hydro's request for approval, you will consider the
5 public interest, you will make them paramount, but the
6 distinction is clear. In the end it is Hydro's
7 approvals which are the subject matter of the
8 application.

9 The public policy considerations and the
10 public interest considerations have no utility or have
11 no reference to the matter other than the context of
12 the relief sought by the applicant, which is
13 extraordinarily different from the case Mr. Heintzman
14 referred to.

15 Mr. Chairman, in the event you determine
16 that the leave of this Board is required to permit
17 Ontario Hydro to withdraw the application, in my
18 submission that leave ought to be granted.

19 I think you have largely heard many of
20 the arguments in favour of it, as people have argued in
21 favour of the Applicant's right to withdraw. It's an
22 expensive procedure, the proponent considers it to be
23 irrelevant to its needs at the moment. You know that
24 my client disagrees with the notion of Hydro's view
25 that no approvals are needed today, but the proponent

1 has determined that the matter is irrelevant to its
2 needs at the moment.

3 There is an ongoing and significant
4 public expense or ratepayer expense that my client's
5 customers will continue to bear.

6 And I go back again to the argument, Mr.
7 Chairman, it may seem trite but I think really it is
8 paramount that it is Hydro's application for approvals
9 of which is in issue. It's ultimately for Ontario
10 Hydro to decide where and when it wants to seek
11 approvals.

12 To resurrect a debate I have had with
13 this Panel before, it's not a public inquiry here and
14 you have no plenary jurisdiction, you have no plenary
15 jurisdiction to tell Hydro if Hydro is not seeking
16 approvals, how it should run its business. If the
17 government wants to do that, it can as it is
18 endeavouring to do, hopefully vainly, ask for some
19 Panel's advice, it can talk with Ontario Hydro's Board
20 of Directors, it can talk with Ontario Hydro's
21 management. But under the scheme of legislation,
22 governance of Ontario Hydro we have in this province,
23 it is still exclusively within Hydro's bailiwick to be
24 the master of its own house. And while its approvals
25 are necessary, your approval is necessary for it to

1 proceed with some aspect of its business, I think Mr.
2 Heintzman's is fundamentally wrong, with respect, when
3 he says it's also your business when the Applicant
4 wants nothing and asks nothing, to tell it what it
5 ought to be doing.

6 If nobody in this province had the power
7 on the day before Hydro submitted its application to
8 tell Hydro what to do, in my submission it shouldn't
9 change. As a matter of policy - leaving aside the
10 technical arguments and the legislation which I have
11 already addressed - as a matter of policy, if you feel
12 you have to address the question of whether leave ought
13 to be given, if there was nobody in this room who could
14 tell Hydro what to do the day before it commenced its
15 application, I see in my respectful submission no
16 circumstances which have changed which should lead you
17 to the view that you ought to continue on for the
18 purpose of telling Hydro to do something when it says
19 it wants to do nothing at all and withdraw from the
20 matter.

21 And I ask you, Mr. Chairman, also to look
22 at the practical difficulties, the inordinate practical
23 difficulties which would be associated with the
24 continuation of the proceeding.

25 Undoubtedly in some cases such as the

1 once that Mr. Heintzman referred to, the Board or the
2 tribunal can direct the applicant to essentially
3 proceed with its application. The application is still
4 afoot. You know what relief is sought, the parties
5 know what the case is that they have to meet, and the
6 hearing can usefully and practically continue. But we
7 have already decided in this proceeding that it is for
8 the Applicant, it is for the Applicant to define its
9 undertaking and to amend it as it wants.

10 Now what is it that the Board is actually
11 telling Ontario Hydro it should continue with?

12 Ontario Hydro will stand up and say, we
13 are not continuing with anything, as is their right,
14 you have ruled. They don't have to continue with Plan
15 15, they don't have to continue with the Update, they
16 don't have to continue with the December '93 Update.

17 So what is the case to be met? How do we
18 go about following through on this process when the
19 Applicant says, go ahead, have a hearing. But I can
20 change what I want, you can't even tell me to stand up
21 and seek the relief I am requesting, because they have
22 the unlimited ability to change that relief.

23 So if you look at it in that practical
24 sense, Mr. Chairman, it will turn the matter completely
25 on its ear and I think, with respect, it reinforces my

1 earlier submission that this proceeding simply can't be
2 put into the category of those in which it makes any
3 sense to proceed with the matter.

4 In that regard, Mr. Chairman, just one
5 final observation that applies to a number of points.

6 Mr. Heintzman, in response to a question
7 from Dr. Connell I believe, made the submission to you
8 that there was still an undertaking even if Hydro
9 withdrew their request for approval, but I think, Mr.
10 Chairman, he is wrong in that, because Ontario Hydro
11 has defined the undertaking not just as a program of
12 activities, if that were it, Mr. Heintzman may be
13 right, that as long as there is some program of
14 activities there is an undertaking before you. Ontario
15 Hydro defines the undertaking at page 1-3 of Exhibit 3,
16 as specific matters, those for which approval is
17 requested and required.

18 So while you have ruled that they may be
19 entitled to amend what items they are requesting
20 approval for, to have an undertaking it must have a
21 program of activities in respect of which some approval
22 is requested.

23 THE CHAIRMAN: Don't you have to read
24 that in light of the decision we made in the 452 case?

25 MR. MARK: Yes, Mr. Chairman.

1 THE CHAIRMAN: But you think it was
2 probably wrongly decided. [Laughter.]

3 MR. MARK: I am not going to reargue it.
4 I am not going to reargue that, Mr. Chairman, or any of
5 the others. But I don't recall there being anything in
6 the...

7 You said the proponent can define the
8 undertaking as it wished, and you said, secondly, that
9 it could amend the undertaking, but I don't know that
10 there was anything in the decision which said the
11 undertaking doesn't still have to have within it
12 requests for approvals.

13 THE CHAIRMAN: I think we said something
14 to the effect the request for approvals, the method of
15 carrying out the undertaking, words to that effect.

16 MR. MARK: Yes. That's why you said they
17 can change the matters for which they request approval
18 from time to time because they are alternate methods,
19 but I did not understand that decision to say that the
20 undertaking could consists exclusively of activities in
21 respect of which this Board had no jurisdiction, i.e.,
22 the granting of approvals. I think that would be
23 taking the matter to a point, with respect, of
24 absurdity.

25 Subject to your questions, Mr. Chairman,

1 those are my submissions.

2 THE CHAIRMAN: Thank you, Mr. Mark.

3 Mr. Greenspoon?

4 MR. GREENSPOON: Thank you.

5 Well, I had said at one time that I
6 didn't think it was in the proponent to withdraw the
7 undertaking, or that those words weren't within him,
8 and I am even not still sure. I hope, for the record,
9 I look at yesterday's transcript and he says that we
10 withdraw the Demand/Supply Plan Application, I hope
11 that includes the undertaking. I think we can take it
12 unless --

13 THE CHAIRMAN: He said so this morning.

14 MR. GREENSPOON: Good. (Laughter).

15 I wanted refer you to - I know you won't
16 have it - Volume 100 of the transcript, and that was
17 the day when we got word that the undertaking was going
18 to be amended, or Exhibit 452 was going to be filed.
19 You might recall that I stood up out of order, and much
20 to your chagrin, to object to that amendment, and you
21 said -- I probably should just read it, it's not very
22 long.

23 [11:55 a.m.]

24 I said:

25 I have a submission that I want to

1 put on the record regarding the issue of
2 reintegration.

3 THE CHAIRMAN: Why don't we wait
4 until we get it and then we can deal with
5 it once we have it.

6 And I said that:

7 I am concerned that Hydro is going to
8 file it as an exhibit before we get to
9 it, and I don't think that is proper.
10 Given that it may be an amendment to the
11 undertaking I think that there are too
12 many ramifications regarding it, and I
13 don't think it should be filed outside of
14 this hearing room.

15 And you go on to say:

16 I'm not quite sure I understand what
17 your problem is. I don't quite see what
18 the problem is. It is a document in
19 which everybody has some interest, which
20 you are going to refer to, and which we
21 are going to talk about. And should it
22 not be part of the record of the hearing
23 so people can deal with it?

24 I responded:

25 No, not if it is an amendment to the

1 undertaking.

2 THE CHAIRMAN: I don't know what it
3 is, but if it is then you have a legal
4 question which you have raised many, many
5 times about amendments to the undertaking
6 and which we certainly have under notice,
7 and it won't prejudice anything you want
8 to say about it. The filing of it won't
9 affect it one way or the other.

10 So I think it is too bad that we didn't
11 deal with that issue at that time, but we didn't, and I
12 think that is what we have to deal with now.

13 My interpretation of Section 7(3) is kind
14 of a combination of a number of the submissions, and I
15 think that Mr. Heintzman is partly right, and I think
16 Mr. Castrilli is partly right, and I obviously think
17 that I'm right and I have a different interpretation.

18 I read Section 7(3) in conjunction with
19 Section 12, and I will probably get this wrong, but I
20 think it is the principle of unia inclusio ulterius
21 exclusio, and that is, where a statute includes
22 something it is presumed that they have deliberately
23 excluded something else along with it, and that applies
24 to the withdrawal in my submission.

25 You have been given the power to amend,

1 or accept and amend, the undertaking by Section 12.
2 You haven't been given the power to withdraw or to
3 accept a withdrawal.

4 The Minister has always had the power to
5 amend, to accept and amend, or to accept or to
6 withdraw, although -- accept a withdrawal I think would
7 be a better way to put it.

8 My submission is that you don't have --

9 THE CHAIRMAN: I don't think the Minister
10 has the power to amend after a hearing has been
11 ordered; is that right?

12 MR. GREENSPOON: No, that's right. She
13 has all these powers before the hearing. She passes on
14 powers, certain powers to you, and that is where I say
15 the latin maxim comes into play. You were not given
16 the power to impose such terms and conditions on an
17 amendment or withdrawal.

18 But I say that you do have a power to
19 control your process, and maybe -- my experience is in
20 the criminal courts.

21 It is often in the criminal courts that
22 the Crown withdraws a charge at the eleventh hour. I
23 think that the principle that is analogous to the
24 proceedings here is oftentimes, 99 times out of 100
25 when you are acting for an accused and the Crown

1 withdraws you walk out and you don't say a word.

2 But there are occasions where you do
3 object, and that brings it into this purview, where you
4 have spent a lot of time, where your client has been
5 prejudiced, your client has been put to expense, and I
6 think your jurisdiction is residual and it deals mostly
7 with costs, but there are examples like the one Mr.
8 Poch raised where a person pulls out the day before the
9 argument to try and get another panel, so generally
10 abuse of process, anything that would fall under that.

11 I think the proponent has the absolute
12 right to withdraw the undertaking just as a Crown
13 attorney has an absolute right to withdraw an
14 information against an accused. That is a fundamental
15 principle of English law. That is the principle that
16 is referred to in the Carfrae Estates Ltd.

17 I agree with my friend Mr. Heintzman, and
18 this was relating to Dr. Connell's question, the
19 English cases say that if the statute is silent on
20 withdrawal there is an absolute right of withdrawal.

21 I say this statute is silent as to your
22 jurisdiction on a withdrawal. You have no jurisdiction
23 on a withdrawal, save your residual jurisdiction to
24 control an abuse of process. The Minister didn't give
25 you that right; the statute didn't give you that right.

1 So now what has happened is somebody has
2 objected to the withdrawal, and that is proper. When a
3 Crown attorney withdraws an information the defence
4 counsel can stand up and say, I object, and usually it
5 is because you want costs, and most often -- I have
6 never seen a criminal court award costs to the accused
7 when the Crown has withdrawn.

8 We have had situations like in the Susan
9 Nelles affair, but...

10 In my submission Mr. Heintzman has
11 objected to the withdrawal of the undertaking. You
12 listened to his objections to the withdrawal. You
13 either find merit in those objections or you don't, and
14 it is my submission that you have no jurisdiction to
15 deal with anything unless he can show that there is an
16 abuse of your process by allowing the withdrawal.

17 I wonder what Mr. Heintzman was going to
18 argue, and I find it odd that it is lacking in his
19 argument, what would happen to the motion that is -- I
20 take the position that you are functus, that you can't
21 deal with my motion; your jurisdiction is exhausted.
22 If what he proposes is correct, then I take it we come
23 back and argue the motion when the hearing resumes.

24 I agree with Mr. Heintzman about the
25 integrity of the process. I think there is a broader

1 issue here, the integrity of the environmental
2 assessment process. If we allow this to go on -- I had
3 a difficult enough time so far explaining to my clients
4 how this proceeding is manoeuvring back and forth. I
5 don't know how I will ever explain this to them. I
6 mean, that is obviously my problem and maybe that is --
7 but the process is losing its integrity. And if Mr.
8 Heintzman is to prevail what does the Environmental
9 Assessment Act mean? And I want to pursue that this
10 afternoon when you think about what you want to do in
11 the future.

12 I hope that AECL when they try and put
13 their landfill up in Northern Ontario has this
14 integrity that they talk about.

15 Thank you, those are my submissions.

16 THE CHAIRMAN: Mr. Rogers?

17 MR. ROGERS: Thank you, Mr. Chairman. I
18 will be very brief, and I may with your permission
19 blend a few suggestions about the format to be followed
20 no matter what you decide, but I will be very brief.

21 I can tell you, sir, that as late as
22 Monday afternoon my clients and I were meeting in order
23 to discuss how the hearing might be shortened or ended
24 without losing all benefit of the substantial body of
25 work which has already been undertaken by the Board.

1 Further, we did not wish to see this
2 hearing, which we have viewed as affecting a very broad
3 public interest, much as my friend Mr. Heintzman
4 argued, terminate suddenly upon Ontario Hydro's
5 withdrawal of its application without providing some
6 continuing forum to conclude examination of these
7 important energy issues.

8 My client, the Ontario Natural Gas
9 Association is therefore generally supportive of the
10 proposals for terminating the hearing whereby you will
11 continue as some form of advisory panel to the
12 government, and we would hope that the members of this
13 Panel will be able to work out a suitable format with
14 the government and that each of you will be agreeable
15 to completing your work.

16 With respect to the issue before you now
17 on the legal argument concerning the technical meaning
18 of Section 7(3) of the Environmental Assessment Act and
19 Section 12 of that Act, we take no position. I'm
20 sorry, with great respect to you, I know you must
21 decide this and you must take it seriously, but my
22 client doesn't care how you decide it.

23 I say that for several reasons. First of
24 all, there are many people who feel there have been too
25 many such technical legal arguments already in this

1 hearing to date, and my client is more concerned, as I
2 think many of the other clients are, with the practical
3 realities of the situation, and whether the Board has
4 power under that section to make recommendations
5 concerning conditions of withdrawal or whether that
6 power resides solely with the Minister there can be no
7 doubt, we say, that the Board is going to have
8 substantial influence in the conditions that are
9 imposed in the real world because it will be necessary
10 for the government to work out with you, if you agree
11 to continue in some advisory role, to work out with you
12 the arrangements for the continuation of the advisory
13 panel.

14 Insofar as my client is concerned, Mr.
15 Chairman, and Members of the Board, that gives ample
16 scope for you to effect substantially the terms and
17 conditions of withdrawal of this application. So
18 whether you do it as a Panel because you are obligated
19 to do it, as my friend Mr. Heintzman argues, or whether
20 you do it in your discussions with the government with
21 respect to your renewed role in some other form is
22 frankly immaterial my client.

23 All we ask, however that is determined,
24 is that there be a suitable arrangement made so that
25 those parties who have not yet had an opportunity to be

1 heard will be given the chance to make their case to
2 the Panel or to the advisory tribunal in a fair and
3 reasonable way.

4 We have no specific demands of you or any
5 specific requests in structuring such a framework,
6 except that we encourage a process which will balance
7 the rights of the parties to fairly present their
8 positions with the obvious practical consideration of
9 limitations of time and resources.

10 We hope that whatever format you
11 encourage will ensure that all of the evidence to date
12 could be transported to the new regime for the new
13 panel's consideration. Further, my client has already
14 filed substantial written evidence in this hearing, as
15 have others, we ask that that evidence be made part of
16 the record in the reconstituted process whatever that
17 may be.

18 We have no other specific requests
19 concerning the details of that process which you may
20 adopt so long as we are given an opportunity equal to
21 the other participants to make our case.

22 We do not insist on the right of cross-
23 examination if it is not available to others. We would
24 like the opportunity to give oral evidence to support
25 the written testimony, but we understand that the new

1 body, if one is constituted, may wish to limit such
2 testimony because of the shortage of time and
3 resources.

4 We will be glad to answer any questions
5 which the new body may have about written evidence if
6 that is the course chosen, and, of course, it goes
7 without saying, Mr. Chairman, that if you conclude that
8 you must continue on with this hearing in your present
9 capacity my clients I think would agree to amend the
10 process to shorten the hearing in the ways that I have
11 just described in this setting.

12 I have some concerns, you would have to
13 think through the legality of that, to changing the
14 procedures midstream, but I think my client would not
15 object.

16 Accordingly, we ask that the terms of
17 reference, whether you impose them as part of your
18 decision to end this hearing or whether you work out
19 these arrangements with the government, be sufficiently
20 broad as to allow a consideration of the evidence which
21 we have already filed. That is really what I am asking
22 you to do.

23 Based on the news release of the
24 government and the specific topics which this new
25 organization will be asked to address I submit that

1 that should not be a problem because the government has
2 asked that the Board or you in another capacity
3 consider several topics, including conservation and
4 demand management programs.

5 Well, my client's evidence specifically
6 addresses the scope for and the role of natural gas in
7 reducing electricity demand and the environmental and
8 energy efficiency benefits natural gas use in fuel
9 switching and in load displacement NUGs.

10 The government has asked you to consider
11 the question of Ontario Hydro load forecasts. ONGA's
12 evidence directly impacts on consideration of Hydro's
13 load forecasts because of the potential for fuel
14 switching and load displacement NUG and the market
15 developments driven by electricity and natural gas
16 price differentials. Hydro's future loads will be
17 affected directly by the degree to which competitive
18 market forces are allowed to operate.

19 The third topic is plans for maintenance
20 and refurbishing of existing facilities.

21 THE CHAIRMAN: This is spilling over into
22 what we are going to talk about this afternoon?

23 MR. ROGERS: It is a little, and I have
24 got about less than a minute to go, sir.

25 THE CHAIRMAN: All right.

1 MR. ROGERS: It does indeed, though. I
2 plead guilty to that charge. With your leave just if I
3 could finish it I won't bother you this afternoon.

4 My client's evidence discusses the
5 possible contribution of natural gas in this area and
6 points to the need for fuller examination of the gas
7 potential.

8 Fourth, and last, potential contribution
9 of private power producers to provincial electricity
10 supplies, the ONGA evidence discusses the contribution
11 and role of the Ontario natural gas industry in private
12 power production, including a report on natural gas
13 procurement for power generation.

14 So that is really I think why when I said
15 that we didn't care particularly how you decided the
16 issue before you it was because we felt that the
17 proposal of the government will enable us to address
18 the issues that we would like to address.

19 In any event, sir, I thank you for your
20 patience in allowing me to over-spill a little bit, and
21 I can assure the Members of the Panel that my client
22 remains willing, ready and able to provide information
23 concerning natural gas to you either in your present
24 capacity or in some new role that you may be called
25 upon to play.

1 Thank you very much. Those are my
2 submissions.

3 THE CHAIRMAN: Thank you, Mr. Rogers.
4 Mr. Rodger, are you making submissions?

5 MR. RODGER: I will wait until afternoon.

6 MR. ROGERS: I'm sorry, I jumped out of
7 turn, I realize.

8 THE CHAIRMAN: No, you didn't. No, you
9 were called first.

10 Mr. Power?

11 MR. POWER: Yes, sir.

12 Mr. Chairman and Members of the Panel, my
13 client takes no position on the issue of Section 7(3)
14 and the withdrawal. So my comments are to the
15 discussion of terms and conditions or a decision of
16 this Board or directions and also to the issue of costs
17 if you wish to hear that now, brief comments.

18 THE CHAIRMAN: I think the costs are
19 fairly -- it is a matter that we are not going to
20 discuss today. It is a matter that is recognized has
21 to be dealt with. We have set that aside for today. I
22 think that is well recognized, that no matter what
23 happens the windup of the intervenor funding
24 applications and the costs will have to be dealt with.

25 MR. POWER: Okay. That is acceptable,

1 which is why I raise it at this point. Then I only
2 have some brief comments regarding should this hearing
3 end. I don't want to get caught up in definitions
4 regarding terms and conditions, but my client would
5 certainly ask that you provide some directions in your
6 decision on the following matters.

7 Firstly, that there be sufficient funding
8 provided to complete the technical work which has been
9 commissioned by this hearing. Most of the work is
10 finalized or near finalization and my client feels very
11 strongly that the value of a lot of this work could be
12 lost if it is not put into a format which could benefit
13 others in the future.

14 I am not suggesting that extensive
15 funding to start new work should be granted, but I am
16 suggesting that if people have invested their
17 resources, not just the consultants but members of the
18 communities throughout this province, since 1989 and
19 onwards there should be some consideration to polishing
20 off the work in place.

21 Secondly, regarding a future planning
22 hearing which we may eventually get into with Ontario
23 Hydro - and it sounds like from their point of view we
24 will - my client would greatly appreciate your
25 direction on the value of early notice from Ontario

1 Hydro to all parties the next time they start up their
2 planning process.

3 They feel very strongly that there is
4 great value to involving many if not all of the parties
5 that you have here today, and perhaps new parties in
6 the future, early on in the Ontario Hydro planning
7 process, and by participating in that planning process
8 I am not suggesting polite consultation, but rather, a
9 higher level of input and a more senior management in
10 Ontario Hydro, and it is the hope that this Panel will
11 give some direction to the value of a better
12 integration of Ontario Hydro's planning process and the
13 people and interest groups in that province that that
14 affects.

15 [12:15 p.m.]

16 I will leave my comments regarding where
17 we are going with this new advisory process to this
18 afternoon, but in short I must say that my client also
19 supports the comments that you just heard from my
20 friend as to the value of continuing on, to at least
21 let those who haven't presented their case, make some
22 submission to this Panel.

23 Thank you very much.

24 THE CHAIRMAN: Mr. Mondrow?

25 MR. MONDROW: Mr. Chairman, I should be

1 the briefest yet.

2 The CAC believes that the analysis of
3 this Board's jurisdiction as set out in the
4 submissions, the written submissions of the government,
5 Ministry's and agencies is the correct analysis, and
6 adopts those submissions as our own.

7 Thank you.

8 THE CHAIRMAN: Mr. Anshan?

9 MR. ANSHAN: Mr. Chairman, I will also be
10 very brief.

11 With respect to the applicability of
12 Section 7(3), and this afternoon I will talk more about
13 the role of this Board from here on in, it seems to me,
14 and on behalf of CAESCO our position is that there is
15 internal consistency between the Environmental
16 Assessment Act and the Statutory Powers Procedure Act.

17 We disagree with Mr. Heintzman's
18 interpretation that Section 4 of the SPPA actually
19 applies to the situation, and you have heard already
20 from other parties this morning and we adopt those
21 positions, that that section sets out clearly that
22 unless otherwise provided in other Acts under which
23 these proceedings arise, that section applies.

24 Clearly, Section 18(26) of the
25 Environmental Assessment Act also says except as

1 provided in this Act the SPPA applies, therefore we
2 have that internal consistency, which leads us to
3 Section 7(3) which we believe deals with the question
4 of withdrawing an application, and it, in our view,
5 applies to the withdrawal of Ontario Hydro's
6 application by the proponent.

7 It then for this Board becomes a question
8 of determining whether or not the Minister is required
9 to: (a) approve the withdrawal, and (B), if so, on what
10 terms and conditions.

11 The second part of that subsection (3), I
12 think as Mr. Mark has clearly indicated earlier, is in
13 in our view permissive, which means that the Minister
14 may but is not required to impose terms and conditions
15 on the withdrawal.

16 In the present withdrawal which occurred
17 two days ago by virtue of the proponent withdrawing his
18 application here, and in reviewing the letter from the
19 Minister dated January 25th, 1993, I think we can
20 safely assume that the Minister put her mind to the
21 question as to whether or not terms and conditions
22 should be imposed, and in her judgment decided not
23 impose such terms and conditions.

24 Her letter clearly indicates approval of
25 the withdrawal by the very fact that she has requested

1 this Panel to continue its work as an advisory panel.

2 Had she wished to impose terms and
3 conditions, she obviously would have done so two days a
4 ago.

5 Accordingly, it is our view that
6 subsection 7(3) does apply, that in fact it has been
7 complied with by both the proponent and the Minister.

8 Mr. Heintzman indicated that one of the
9 essential issues you ought to be concerned about is the
10 public interest of closing down the hearing at this
11 point, and I would submit to you that the kind of views
12 he submitted during that discussion are more political
13 questions for the government of the day to consider
14 than they are legal questions for this Board.

15 Those are my submissions on subsection
16 7(3) and I look forward to speaking to you again this
17 afternoon.

18 Thank you.

19 THE CHAIRMAN: Thank you.

20 Mr. Campbell, are you going to make
21 submissions? Mr. Martin Campbell.

22 MR. M. CAMPBELL: No submissions on
23 Section 7(3). I wish to make submissions this
24 afternoon on the other.

25 THE CHAIRMAN: Thank you.

1 Mrs. Mackesy, do you want to make
2 submissions on this morning's topic?

3 MRS. MACKESY: No. I will make
4 submissions this afternoon on the second portion of the
5 hearing.

6 THE CHAIRMAN: Thank you.

7 Mrs. DeQuehen?

8 MRS. DeQUEHEN: No.

9 THE CHAIRMAN: You don't wish to make
10 this morning, no.

11 Mrs. Smith, do you want to make
12 submissions on this morning's topic?

13 MRS. SMITH: Is it only 7(3) that we can
14 talk about now?

15 THE CHAIRMAN: We are talking about the
16 ability to withdraw the application. This afternoon we
17 are going to talk about the new advisory proposal.

18 MRS. SMITH: I will wait until this
19 afternoon.

20 THE CHAIRMAN: All right.

21 Mr. Wright?

22 MR. WRIGHT: Could I make a quick comment
23 on the terms and conditions?

24 THE CHAIRMAN: Yes.

25 MR. WRIGHT: I feel, Mr. Chairman, Panel,

1 that as a practical reality, that you as a board have
2 much to say on the planning process as demonstrated to
3 this point by Ontario Hydro and the public interest.
4 And the wishes of the Ontario government can be met in
5 an orderly winddown and a report of this Board with all
6 the weight that that would carry.

7 I think that would leave a lot more power
8 to the public interest point of view than to do it as
9 an advisory panel.

10 THE CHAIRMAN: Thank you.

11 Yes, Mrs. Smith?

12 MRS. SMITH: Maybe I should speak now
13 because I am not sure if it's a appropriate now or
14 later and I don't want to miss the opportunity.

15 THE CHAIRMAN: You will have an
16 opportunity. Perhaps if you do it this afternoon, that
17 would be better.

18 MRS. SMITH: Thank you very much.

19 THE CHAIRMAN: Government of Ontario, Mr.
20 Moran?

21 Is there anyone I have missed?

22 Yes, sir?

23 MR. CLARK: I have a submission here from
24 NAPA.

25 THE CHAIRMAN: Yes.

1 MR. CLARK: I would like to file it with
2 you right now, and Mr. Colborne will be here this
3 afternoon. It's actually related more to this
4 afternoon.

5 THE CHAIRMAN: If it's related to
6 afternoon, that is fine, but if its related to this
7 morning it should be done now. If it's related to the
8 issue of Hydro's withdrawal of the undertaking and how
9 that have impinges on the hearing, that should be done
10 now.

11 MR. CLARK: It's more to do with terms
12 and conditions.

13 THE CHAIRMAN: All right, it can be done
14 this afternoon.

15 MR. BULLOCK: Off behalf of CNA, Mr.
16 Chairman, CNA would concur with Mr. Wright's
17 submissions about the public interest.

18 THE CHAIRMAN: Thank you.

19 Mr. Moran?

20 MR. MORAN: Thank you, Mr. Chairman,
21 Members of the Panel.

22 The position of the government on all of
23 this overall is that the hearing is over and was over
24 the moment that Ontario Hydro indicated to you that it
25 was withdrawing its application, subject only to those

1 matters relating costs and intervenor funding which you
2 have specific jurisdiction to deal with under the
3 statutes involved.

4 With respect to Section 7(3) of the
5 Environmental Assessment Act, the opening question that
6 has to be addressed is just what exactly is the
7 jurisdiction that is created by that section.

8 Section 7(3) refers to what happens when
9 a proponent withdraws its environmental assessment.
10 There has been considerable reference to withdrawal of
11 undertakings here today, but we are talking about an
12 environmental assessment and not an undertaking, and I
13 believe that's important for the analysis. What
14 happens when a proponent withdraws its environmental
15 assessment after the notice of completion has been
16 issued by the Minister?

17 The starting point for my analysis is
18 this: That you have to have a withdrawal on your hands
19 first and then what follows from that is a decision by
20 the Minister of whether she will impose terms and
21 conditions or not.

22 It's discretionary, permissive, the use
23 of the word "may" indicates that. There are no time
24 limits on it, and it would not make a lot of sense if
25 permission had to be sought in advance and we were

1 already into a process and the proponent had to
2 continue in the process while the Minister decided or
3 didn't decide to issue such an order.

4 The decision to withdraw is the
5 proponents, and that's what we have seen here. And we
6 have to keep in mind what the Act is all about.

7 The Act is about a proponent seeking
8 approval to proceed with an undertaking, and if a
9 proponent doesn't want to seek approval to proceed with
10 an undertaking any more, then it doesn't make any
11 difference whether there is a hearing on or not, or
12 whether that withdrawal took place before the hearing
13 started; they don't want that permission, they say they
14 don't need it and it doesn't make any sense for any
15 further work to be done by the Board because the three
16 decisions that you have been asked to make by virtue of
17 the reference are no longer relevant.

18 Having said that then, I believe it is
19 important to actually look at the wording of the
20 provision that gives you your jurisdiction to make
21 decisions with respect to the environmental assessment,
22 and those provisions are found in Section 12(2) sub
23 (C), (D) and (E). You were given very specific
24 jurisdiction under those provisions.

25 The first thing that you have to decide,

1 and this is in the context of the hearing that has gone
2 to completion with no more evidence to be tendered, the
3 first thing you will have to decide at that point is
4 whether you are going to accept the environmental
5 assessment, and there is another provision in the Act
6 that will provide you with direction on that.

7 If the environmental assessment has been
8 amended then you are going to have to decide if you are
9 going to accept the amended environmental assessment.
10 There is nothing in that provision that says that you
11 are going to impose terms and conditions on an
12 amemdment; all you are going to do is decide whether
13 you are going to accept the amended EA.

14 This, in my submission, is very
15 consistent with the position of this Board in other
16 decisions where the Board has ruled that at the end of
17 the day the environmental assessment consists of not
18 just the original document, but all of the evidence
19 that has been filed and addressed and cross-examined at
20 the end of the day.

21 At the end of the day you are looking at
22 an amended environmental assessment, and at the end of
23 the day you are going to determine whether you are
24 going to accept that amended environmental assessment.
25 And there a couple of reasons why you have to do that.

1 The proponent has a positive obligation to address
2 alternative methods and alternatives to under Section
3 5(3), and proponents don't always cover all of those
4 alternatives and it's open to intervenors to bring in
5 their own alternate methods and try to convince the
6 Board that that's the one that should be approved. If
7 it's not in the environmental assessment originally
8 filed, then the Board couldn't approve that, but we
9 have Divisional Court decisions and Court of Appeal
10 decisions that say that the Board can in fact approve
11 alternative methods.

12 Once you have got past the acceptance
13 decision, the next decision point for you is whether
14 you are going to give approval and that approval
15 relates to proceeding with the undertaking.

16 If you are not going to give approval, in
17 my submission that's the end of the discussion, the
18 hearing is over, there is no approval. There is
19 nothing in that provision that says that you have the
20 power to impose terms and conditions where you have
21 decided not give an approval.

22 The reason that I bring this point up is
23 because it would not make much sense that on the one
24 hand where you have gone right to the end of the
25 hearing and you have decided not to give an approval

1 and you don't have any authority to impose terms and
2 conditions, it doesn't make any sense to have that
3 situation and then at the same time as AECL would
4 suggest, you have a withdrawal before you get to the
5 end of the hearing, a withdrawal that's tantamount to a
6 disapproval in effect, because you can't proceed, you
7 don't have approval to proceed, and somehow you can
8 impose terms and conditions on that. It simply doesn't
9 make very much sense.

10 And finally, provision 12(2)(E) in my
11 submission makes it clear that you do have the power to
12 impose terms and conditions but that only happens after
13 you have decided there is going to be an approval, and
14 then you have to decide whether you are going to impose
15 terms and conditions at that time, and those terms and
16 conditions of course can only attach to the approval.

17 It's useful to examine Section 23(1) of
18 the Environmental Assessment Act as well, just the
19 wording in there I believe assists us in understanding
20 what you have been asked to decide.

21 Section 23(1) relates to the ability of
22 the Minister to vary a decision of the Board. And just
23 the first five lines I think give you an indication of
24 the kinds of things you have been asked to decide.
25 Within 28 days after receipt by the Minister of a

1 decision of the Board on any matter referred to it by
2 notice of the Minister pursuant to subsection 12(2),
3 and then it goes on.

4 So you have jurisdiction to decide those
5 matters. And nowhere in those three subsections of
6 Section 12 do you find any mention of withdrawal.

7 The only occurrence of withdrawal is in
8 Section 7(3).

9 Section of Section 7(3) is quite a
10 different provision. It doesn't actually deal with any
11 of the three matters that you are going to decide on.
12 It doesn't deal with acceptable, it doesn't deal with
13 approval, it doesn't deal with conditions of approval.
14 It just deals with an amendment to an environmental
15 assessment or withdrawal of an environmental assessment
16 and what kind of terms that the Minister might impose
17 at that time.

18 So it's my submission therefore, you have
19 no jurisdiction at all based on the plain meaning of
20 the statute and the provisions within it to require
21 terms and conditions of the proponent as result of
22 result of a withdrawal.

23 In my submission, the only result that
24 flows from having had the matter referred to you, the
25 only impact on 7(3) is that while it's before you and

1 while you are considering whether you are going to
2 accept an amended EA, the Minister may not have the
3 power at that time to impose terms and conditions on an
4 amendment, but she would still have the power with
5 respect to withdrawal because the hearing at that point
6 has stopped, you are no longer seized with the
7 jurisdiction under Section 12 and the Minister will
8 have to consider at that point whether it's a
9 appropriate in her sole discretion to impose conditions
10 upon a withdrawal.

11 What this takes me to now is AECL's
12 position that the Board nevertheless has to make a
13 decision because of the referral, that you have to go
14 to the end of the hearing and make the three decisions
15 that you required to make.

16 In my submission, this simply flies
17 directly --

18 THE CHAIRMAN: I think Mr. Heintzman
19 recognized we may not do that, we may simply make a
20 decision to terminate, or make a finding that we agree
21 with your interpretation of 7(3). But we have to do
22 something.

23 MR. MORAN: That's right. And I am
24 specifically addressing the proposition that you can
25 somehow continue with the hearing, and I believe that

1 was a major part of his submission, and it certainly
2 listed in the relief that he seeks --

3 THE CHAIRMAN: Yes. That's part of it,
4 it's not the whole thing, though.

5 MS. MORAN: That's correct, and I am not
6 suggesting it's the whole thing.

7 I just want to address that particular
8 issue.

9 In my submission, such a proposition
10 simply cannot stand up. It flies directly in the face
11 of the regulatory scheme that we are dealing with here,
12 given as I indicated earlier, it's about a proponent
13 seeking approval to proceed with an undertaking. After
14 the proponent has decided that it is not going to
15 proceed with an undertaking, it would not make any
16 sense whatsoever for a Board to continue a hearing to
17 the end. You get two possibilities in such a scenario.
18 One possibility is at the end of the day there is an
19 approval. Well, the proponent doesn't want it, has
20 decided not to do it, and in the absence of an
21 approval -- that in the absence of the proponent at
22 the hearing, that the proponent could somehow get an
23 approval to proceed with something that it clearly
24 indicated it didn't want do any more doesn't make a lot
25 of sense.

1 The alternative scenario is where you get
2 to the end of the hearing and the Board decides there
3 isn't going to be an approval. Well, the proponent
4 already indicated that to everybody by withddrawing
5 when it did, that it didn't want an approval, and it
6 doesn't make again a lot of sense for the Board to go
7 through an expensive proceeding to get to that same
8 conclusion.

9 Just in passing, one must ask who would
10 pay for such a process at that point and I didn't hear
11 AECL volunteering to be a funding proponent in such a
12 situation, and the funding implications obviously
13 indicate that his proposal is an absurd one.

14 The next point to be dealt with is the
15 application of the SPPA to all of this, and Mr.
16 Heintzman relies very heavily on Section 4. In my
17 submission, Ms. Patterson, you had it exactly right
18 when you described that as a provision that deals with
19 settlements. To assist in that analysis I believe we
20 can look at the location of Section 4 in the Statutory
21 Powers Procedure Act itself, and it is up at the front
22 and it's -- before notice has to be given, those
23 provisions, and all of the provisions that relate to
24 how a hearing must be conducted. It's clearly looking
25 at a settlement of issues.

1 In addition to that, if you have a
2 settlement where there is an agreement that the
3 proponent will be allowed -- everybody agrees that the
4 proponent should go ahead with its undertaking because
5 everybody has agreed on terms and conditions, then
6 clearly we are not contemplating a withdrawal under
7 that situation.

8 The proponent still wants to the
9 approval, and just because everybody has agreed doesn't
10 mean the proponent can now go ahead and do it. They
11 still have to come in front of the Board and the Board
12 still has to satisfied itself with respect to its own
13 jurisdictional requirements, the three decision points,
14 and once that is done then perhaps the agreement is
15 what ends up in the approval, but it's a different
16 situation from when you have a withdrawal. A
17 withdrawal is not necessarily something that everybody
18 is going to agree to in terms of conditions necessarily
19 and if they did, then Section 7(3) with the Minister's
20 power may have some application, but that wouldn't be
21 of any relevance particularly to what the Board has to
22 do.

23 That's specifically the situation we see
24 in the County of Oxford Holbrook decision that my
25 friend referred to you. And the Board quite properly

1 exercised its jurisdiction and issued the decision that
2 it did.

3 There was no request for a withdrawal put
4 on the table. There was nobody suggesting the
5 proponent was withdrawing. The proponent wanted its
6 approval and before it asked for the approval, it was
7 able to get an agreement amongst all the interested
8 parties that had anything to say. Presumably what
9 would follow then is that agreed evidence would be
10 presented to the Board and the Board would indicate
11 whether it was satisfied and once it was satisfied then
12 an approval would ensue.

13 [12:34 p.m.]

14 In my submission, that is the only case
15 of relevance that my friend has brought to you. He did
16 refer to others, and I want to look at Carfrae Estates
17 with you for a moment, because Mr. Mark I think
18 distinguished that case very well on the facts, but Mr.
19 Justice Reid within the decision itself distinguishes
20 that case on the law for at least our purposes, and I
21 would bring you to a key provision in that at page 539
22 of the Carfrae case. The last full paragraph is the
23 one that I want to draw your attention to on page 539.

24 It reads:

25 "Neither counsel has been able to

1 place before us any decisions that
2 otherwise govern the questions before us.
3 Counsel have referred to decisions that
4 arose under rental legislation in England
5 and under provisions for rental control
6 that occurred in Canada during the last
7 war. I think I express our views fairly
8 when I say that we do not find these
9 decisions to be particularly relevant.
10 But going further than that, we do not
11 find any of these decisions to be
12 governing or dispositive of the question
13 before us. We are thus forced to look at
14 the statute alone for an interpretation
15 of the section. We must look at the
16 entire statute, consider its objects and
17 consider as well the other provisions
18 surrounding the one under discussion."
19 In my submission, that provision makes it
20 very clear that whatever other decision AECL may want
21 to draw your attention to it is not particularly
22 helpful in this case because we have to look at the
23 provisions of the Environmental Assessment Act and the
24 SPPA in order to be able to come to a conclusion about
25 what Section 7(3) means and what the Board's

1 jurisdiction is with respect to giving permission to
2 withdraw. The fact that there are other situations out
3 there, as Mr. Justice Reid has indicated, is not
4 dispositive or governing of the situation.

5 Mr. Castrilli I think has indicated very
6 properly that you have to look at the entire statute,
7 and in my submission that is all you have to look at as
8 well because the statute speaks for itself.

9 Even if we were to consider that Section
10 4 could apply to this situation the wording of the
11 section itself says that it can't because it refers to
12 the possibility of the matter being dealt with directly
13 in the statute that is under consideration, and in my
14 submission Section 7(3) clearly contemplates what
15 happens when a withdrawal occurs, and because of that
16 Section 4 of the SPPA is no longer applicable to the
17 discussion.

18 There is one point that remains, and that
19 is the suggestion perhaps that as a result of
20 withdrawal unilaterally that this somehow will cut
21 people out of the process, that Ontario Hydro is now
22 free to wander down whatever path it feels like. At
23 one point Mr. Mark was suggesting that Ontario Hydro is
24 an unfettered giant walking into the future. He didn't
25 use those words, but that was the gist of what he was

1 saying. I think Hydro itself will more than quickly
2 recognize that there are great inhibitions placed upon
3 it through a variety of processes and statutes.

4 Ontario Hydro if it wants to proceed with
5 anything will have to put an environmental assessment
6 together describing what it is that they want to
7 proceed with and complying with the Act, and then the
8 process will be engaged once again in whatever form it
9 gets engaged. And whoever is of the opinion at this
10 stage that they are somehow cut out of the discussion
11 will of course be back into the discussion at that
12 time.

13 So in my submission, there is no
14 prejudice to be dealt with if that is a concern, and
15 the public interest is still protected on the basis
16 that the Environmental Assessment Act will still apply
17 no matter what it is that Ontario Hydro ultimately
18 decides that it needs to proceed with.

19 The fact that Ontario Hydro has indicated
20 it is not proceeding with anything any more --

21 THE CHAIRMAN: That is not quite true.
22 It said it was proceeding with hydraulic.

23 MR. MORAN: I was less than accurate.

24 The fact that Ontario Hydro is not
25 seeking permission to proceed with anything at this

1 time does not mean that the Board should then
2 consider -- continue to consider any of the issues that
3 are raised by virtue of the reference, because if Hydro
4 is not seeking permission, it is not seeking
5 permission. And that is the purpose of the Act, is to
6 determine whether they should get permission.

7 Ontario Hydro is free to determine what
8 it is that they will seek permission for, guided of
9 course by the requirements of the Environmental
10 Assessment Act, and guided perhaps by any regulation
11 that the Minister may impose upon Ontario Hydro
12 designating particular items as being subject to the
13 Act or not as the case may be.

14 All we have is a withdrawal at this
15 point, and to conclude, in my submission, that that
16 withdrawal determines the matters as far as this Panel
17 of the Environmental Assessment Board is concerned,
18 subject to finalizing costs and intervenor funding.

19 To end off then, you have to make a
20 decision, Mr. Chairman, and Members of the Panel, as
21 you indicated.

22 In my submission, if you conclude after
23 hearing all of our submissions that assuming you did
24 have the jurisdiction to give permission, if you
25 conclude at the end of all of that that you would give

1 permission and that you wouldn't impose terms and
2 conditions, then in my submission on that basis you
3 don't necessarily have to indicate an answer to the
4 jurisdictional issue. You can simply proceed on that
5 assumption and indicate that the issue is moot because
6 you wouldn't do it anyway. In my submission there is
7 plenty of case law that says issues should not be
8 decided unless they have to be.

9 Subject to any questions those would be
10 my submissions.

11 THE CHAIRMAN: Thank you, Mr. Moran. Mr.
12 Campbell?

13 MR. B. CAMPBELL: Mr. Chairman, I don't
14 think there is anything useful that I can add to the
15 many persuasive arguments that have been put forward in
16 support of the position in our written submissions.

17 I simply take the position on behalf of
18 Ontario Hydro that having heard all of this, the relief
19 requested on this matter is that the Board make a
20 determination that the hearing was terminated by the
21 action of Ontario Hydro in withdrawing the application
22 and that in the event the Board is wrong in this
23 conclusion that it declare the hearing to be terminated
24 without the imposition of terms and conditions, subject
25 only to consideration of costs and procedural matters

1 relating to the winding up of this matter.

2 Thank you.

3 THE CHAIRMAN: Do you have any procedural
4 matters in mind other than costs and intervenor
5 funding?

6 MR. B. CAMPBELL: No, Mr. Chairman, but
7 the creativity of this crowd knows no bounds and there
8 may yet be matters to be dealt with.

9 THE CHAIRMAN: Is there anyone who wants
10 to make submissions in the nature of reply submissions
11 to this issue?

12 MR. HEINTZMAN: Any remarks I would make
13 would be reply to the other remarks--

14 THE CHAIRMAN: Yes.

15 MR. HEINTZMAN: --I will want to make?

16 THE CHAIRMAN: Anyone else besides Mr.
17 Heintzman?

18 Mr. Heintzman?

19 MR. HEINTZMAN: If I can deal with Mr.
20 Moran's position first, because I think it is like
21 saying something and then saying it must be so, if you
22 will look at Section 12(2) of the Act Mr. Moran is
23 saying the proponent has withdrawn its assessment;
24 therefore, there is nothing further to do.

25 But the whole issue before you is whether

1 the Applicant or proponent can withdraw the assessment.
2 That is the legal issue that you must determine.

3 What we are saying to you is that the
4 proponent cannot; it is still in front of you. Leave
5 aside the actual undertaking, this document
6 (indicating), this assessment as an assessment is still
7 in front of you until you grant an order permitting it
8 to be withdrawn.

9 That is the issue. And by Mr. Moran
10 saying, well, the Applicant has withdrawn the
11 assessment therefore you have no further power just
12 doesn't answer the question. I submit that the
13 assessment itself cannot be withdrawn. Leave aside the
14 undertaking; the assessment itself cannot be withdrawn
15 until this Board gives a decision permitting that to
16 occur.

17 The Minister distinguished in the same
18 way. When he wrote his order of January the 17th, 1990
19 he required you to hold a hearing with respect to the
20 environmental assessment.

21 I say that he cannot withdraw it, that
22 Ontario Hydro cannot withdraw the assessment. An
23 assessment is a big document with many policy issues in
24 it, many issues to be addressed. It has a public
25 policy purpose besides the underlying undertaking that

1 merits consideration by this Tribunal and upon which
2 you can act.

3 Now, the question with respect to the
4 undertaking is of course a different one, and I believe
5 that you answered all the issues on that back last
6 March, and Mr. Mark made the identical submissions then
7 that he made today.

8 The undertaking is something that can
9 change with time, as the Board has said. The only
10 consequence -- and you made this clear. I will read
11 from your reasons: The only consequence to the
12 undertaking changing is a natural justice consequence,
13 a fairness consequence.

14 And you said on that occasion, and
15 therefore I submit that it is as good today as it was
16 then, that the change in the undertaking may result in
17 new notices being given on a recommencement of the
18 hearing. All of those things which don't result from a
19 loss of statutory jurisdiction, they result from an
20 unfairness, they result from loss or failure of natural
21 justice.

22 And I refer you to pages 7 through 9 of
23 your reasons where after quoting from re Ontario Hydro,
24 Southern Ontario Bulk Electricity Undertaking, you
25 said:

1 While recognizing that it is the
2 position of Ontario Hydro that there has
3 been no change in the undertaking we are
4 of the opinion that a proponent is
5 entitled to propose a change in the
6 undertaking in the course of a hearing.
7 If that occurs, jurisdiction is not lost
8 but the rules of natural justice apply
9 and the Board must examine the degree of
10 change and decide how to proceed to carry
11 out its statutory duty. In certain cases
12 it might be necessary to terminate a
13 hearing.

14 Continuing at the bottom of page 8:

15 In our opinion the proposals
16 contained in Exhibit 452 are not of such
17 a nature as to require the giving of a
18 new notice of hearing or a recommencement
19 of the process. The initial notice given
20 by the Board was comprehensive.

21 THE CHAIRMAN: I may be missing something
22 here, but I don't know what difference this makes.
23 Doesn't the greater include the less?

24 What has been asked to be withdrawn in
25 your submission is the environmental assessment,

1 which -- the environmental assessment of the
2 undertaking. Whether the undertaking can change or has
3 changed or how it exists today, how does that impinge
4 on what we have to do?

5 MR. HEINTZMAN: Well, if the undertaking
6 is not withdrawn the next question will be to Ontario
7 Hydro --

8 THE CHAIRMAN: That is not what has been
9 withdrawn. What has been withdrawn is the
10 environmental assessment of the undertaking.

11 MR. HEINTZMAN: The environmental
12 assessment.

13 THE CHAIRMAN: The undertaking continues.
14 There is an undertaking.

15 MR. HEINTZMAN: Exactly. The
16 environmental assessment is sought to be withdrawn.

17 THE CHAIRMAN: I understand that.

18 MR. HEINTZMAN: Yes, all right. So if
19 the environmental assessment is sought to be withdrawn
20 but is not yet withdrawn the issue is whether the
21 assessment, the environmental assessment can be
22 withdrawn.

23 THE CHAIRMAN: Yes.

24 MR. HEINTZMAN: All I am saying is that
25 no, that is the issue upon which we are arguing today,

1 and I submit that it requires your decision to permit
2 it.

3 THE CHAIRMAN: Yes.

4 MR. HEINTZMAN: The change in the
5 undertaking is a matter that may require new notice,
6 goes to an issue of natural justice, but does not
7 necessarily go to the question of whether you should
8 permit the environmental assessment to be withdrawn.

9 You may on the grounds of natural
10 justice, but it doesn't go to your statutory duty to
11 consider the assessment.

12 THE CHAIRMAN: I see. So let me see if I
13 have got that.

14 MR. HEINTZMAN: And I believe that is
15 exactly what you said last April.

16 THE CHAIRMAN: What you are saying is
17 that the only basis on which this Board ought to
18 terminate a hearing following a change in the
19 undertaking is if there has been a denial of natural
20 justice?

21 MR. HEINTZMAN: Yes, yes

22 THE CHAIRMAN: All right.

23 MR. HEINTZMAN: And indeed, Mr. Chairman,
24 if for instance you tell Ontario Hydro, I'm sorry, but
25 we are not going to permit you are to withdraw the

1 environmental assessment, now tell me in that light are
2 you withdrawing the particular hydraulic approvals? If
3 they say -- they haven't said they will. We don't know
4 what they will do. But they may well say, well, if we
5 are in here with our environmental assessment, yes, we
6 still want our hydraulic approvals to be included as
7 part of the undertaking.

8 THE CHAIRMAN: Well, no. I understand
9 that is not what they said. They said they were
10 withdrawing what they call their Application, which
11 clarified means the environmental assessment, and they
12 have said that to the extent to which they wish to
13 pursue hydraulic approvals they will do so through the
14 existing EAs or future EAs or existing EAs as amended.

15 MR. HEINTZMAN: That's correct. That I
16 think goes to the whole question of abuse of process.

17 I mean, if the environmental assessment
18 is still before this Board and continues, then surely
19 this Board should ensure that it complete the hearing
20 with respect to the hydraulics and not have -- unless
21 its application is dismissed with prejudice and
22 therefore it cannot recommence in another hearing as to
23 the issue that was before this hearing; namely, need
24 and rationale.

25 So I think it is by looking at the

1 function of the Board in permitting the assessment to
2 be withdrawn that you can only grapple with this.
3 Should you permit this policy document to be withdrawn,
4 that is the issue.

5 But it does no good to say, as Mr. Moran
6 does, that it has been withdrawn. It hasn't been
7 withdrawn in my submission. It can only be withdrawn
8 once you give a decision permitting it to be withdrawn.
9 Once that is seized then all Mr. Moran's arguments just
10 disappear.

11 I mean, he started off with that premise,
12 that it is withdrawn. Once it is conceded, as I submit
13 is the case, that it is not withdrawn until you give
14 approval, then it is before you; you have to make the
15 decision that he says you don't have to because it has
16 been withdrawn.

17 THE CHAIRMAN: I see.

18 MR. HEINTZMAN: Dealing with the question
19 of Section 4 of the Act there are two of the decisions
20 that I referred to you of the SPPA. Two of the
21 decisions I gave to you commented on Section 4, and I
22 would like to address you or direct you to those.

23 If you have the Uniroyal Chemicals
24 case -- because I think Section 4 of the SPPA is
25 understood to mean what I say it means.

1 THE CHAIRMAN: Well, it means what it
2 says.

3 MR. HEINTZMAN: Well, it requires
4 interpretation.

5 THE CHAIRMAN: Yes.

6 MR. HEINTZMAN: It has been interpreted
7 in accordance with my submissions.

8 THE CHAIRMAN: All right. Well, you
9 direct me to that.

10 MR. HEINTZMAN: Yes. The Uniroyal
11 Chemical case at page 17, after quoting Section 4 the
12 Board said:

13 "It appears to us that the
14 Environmental Protection Act requires the
15 Board to hold a hearing and that section
16 4(c) of the SPPA in combination with the
17 provisions of the EPA and section 3 of
18 the SPPA prohibits the Board from
19 disposing of a proceeding without
20 holding this hearing unless all the
21 parties have waived a hearing."

22 And the Ontario Human Rights Code board
23 of inquiry said words to the same effect in the --

24 MS. PATTERSON: I think we should go back
25 to the rest of that portion on page 17 where it says:

1 "The question is, therefore, whether
2 we have held a 'hearing.'

3 And they reject the notion that a proceeding is not a
4 hearing unless all parties have equal rights to call
5 evidence regardless of a settlement.

6 MR. HEINTZMAN: Exactly. They go on and
7 discuss and indeed hold that they have jurisdiction to
8 determine whether the hearing should be discontinued
9 and whether they are in effect functus, and they say,
10 no, we have an obligation to perform.

11 And while we are at this case could I
12 just read to you because it is in response to other
13 parties where it was said: What is the public interest
14 here? The public interest is only prejudice. That is
15 what was suggested out of Mr. Justice Reid's case.

16 Well, prejudice in that case was the
17 public interest, but the public interest is a lot
18 broader than prejudice. When you have tenants whose
19 rents are being set, that may be the prejudice in that
20 case which raises the public interest, but the public
21 interest is a lot broader than that.

22 The Board in this case, if you would turn
23 to page 10, says in the last paragraph, second
24 sentence:

25 The first element is that the hearing

1 before the Board is not merely lis inter
2 partes but a determination in the public
3 interest of policy issues that affect a
4 much broader public than the two
5 statutory parties to the hearing.

6 [12:55 p.m.]

7 Further on down that page:

8 Is it also significant that the
9 Environmental Protection Act and the
10 Ontario Water Resources Act are pure
11 public law which create few private
12 rights or remedies.

13 And on page 11, and this is going to come
14 back to a point that was made concerning the Minister's
15 right to terminate the hearing under Section 7(3)
16 because a similar argument was made in that case. In
17 the second paragraph:

18 A second important aspect of the
19 statutory framework is the relationship
20 which it establishes between the
21 director, the Board and the Minister.
22 Put simply, the Environmental Protection
23 Act gives the Board very broad authority
24 to override the director and gives the
25 Minister equally broad power to override

1 the Board. The effect of the statutory
2 framework is that the statute clearly
3 contemplates that where the Board and the
4 director disagree, the Minister will
5 decide between them. In effect, the
6 director and the Board both provide
7 advice to the Minister. Where they
8 disagree the Minister can decide which
9 advice to take.

10 Now that's exactly what we have in this
11 case under Section 23, I think it is, of the Act. A
12 decision of this Board -- and the decision continues:

13 Thus the scheme of the Act dictates
14 that the disputes between the Board and
15 the director should be resolved within
16 the self-contained framework set out
17 fully in part 13 of the Environmental
18 Protection Act.

19 And that's exactly what I have been
20 saying. If the Minister does not like the decision of
21 this Board, then it has the power to vary, rescind,
22 substitute its own decision in Section 23(1)(A), (B)
23 and (C). And I say that clearly shows you that the
24 powers of the Minister before it gets to the Board and
25 after it gets to the Board and the Board has made a

1 decision are stated clearly. The Minister can allow
2 the application to be discontinued before the Board is
3 engaged, it can reject the Board's decision after the
4 Board has made its decisions, but otherwise the hearing
5 is to proceed before this Board in the framework set
6 out in the Act, and it is not permitted, in my
7 submission, clearly, for the Minister to interfere in
8 that process while the hearing is on.

9 And continuing on with the public
10 interest, the Board in this case said at page 11 --

11 THE CHAIRMAN: You are not suggesting the
12 Minister has done such a thing. There has been no
13 interference by the Minister in this process.

14 MR. HEINTZMAN: I am saying that there is
15 no mechanism pursuant to which Minister can of his own
16 cause the hearing to end. Now, I think --

17 THE CHAIRMAN: Well, that turns on the
18 interpretation of 7(3).

19 MR. HEINTZMAN: Exactly. And I am saying
20 that therefore when you read Section 7(3) in the
21 framework of the Act, the Act intended there to be this
22 framework in which this Board dealt with the matter
23 uninterfered with by the Minister so far as the matter
24 is -- while the matter is before this Board. And
25 that's exactly what this appeal said.

1 You Minister, or you director, or
2 whatever, can't stop us as of right from hearing this
3 appeal. And I am saying the same thing.

4 Any disputes between this Board is a view
5 of the matter and the Minister are to determined in
6 accordance with the Minister's decision not to uphold
7 the decision of this Board, to vary it, rescind it,
8 substitutes its own. That's where the statute speaks
9 to the Minister's powers, and that's exactly what the
10 Board in the Uniroyal case said. During our hearing
11 you parties cannot agree and settle this thing or
12 withdraw it without us having some say about it. And I
13 say exactly the same applies here.

14 In the fourth paragraph on page 11 the
15 Appeal Board said there is a third factor which
16 suggests that the Board may have jurisdiction to
17 approve a withdrawal or settlement, the environment and
18 future generations cannot speak for themselves, someone
19 must protect their interests, et cetera. And that's
20 again speaking to the public interest. It's not a
21 public interest as a prejudice to somebody's pocket;
22 it's a prejudice to the environment, this Board is here
23 to protect that public interest.

24 And did I give you the decision in
25 Aborey, which I referred to you in my factum. It's one

1 of the decisions and the North York Branson Hospital,
2 decision under the Human Rights Code. And on the
3 second page, paragraph 32846:

4 On the other hand, Section 4 of the
5 Statutory Powers Procedure Act provides
6 that settlements are permitted unless the
7 tribunal otherwise directs. This
8 suggests a recognition that tribunals may
9 be responsible for conducting proceedings
10 which transcend in importance the
11 interests of the specific parties before
12 them.

13 And going on to quote authority.

14 Now that's what Section 4 of the Act is
15 understood of the SPP Act. That's what that section is
16 understood to mean. That that section says that, in
17 effect, the parties cannot settle the proceeding
18 without this Board's approval. Settle, withdraw,
19 nobody has distinguished those as processes and this
20 section speaks to the public policy to that effect.

21 I am not sure that Ontario Hydro and the
22 Minister are really saying the same. It seems to me
23 that somebody is saying that until the Minister grants
24 his order, there is still a proceeding. Now, it seems
25 to me that necessarily follows.

1 If the Minister's decision is unnecessary
2 for this proceeding to come to an end, then it seems to
3 me there is hiatus in the Act, you could have the
4 hearing come to an end and the Minister might not make
5 a decision for years or never, and I don't read Section
6 7(3) as saying that.

7 If section 7(3) has any impact, it must
8 be that the withdrawal does not become effective until
9 there is a Minister's order. If that is the case, so
10 far as we are concerned, there is no Minister's order.
11 And I don't want to get into trivia, quite frankly,
12 because this is an important matter so far as the
13 jurisdiction of this Board is concerned. But Mr. Moran
14 said this morning in answer to the Chairman:

15 Has the Minister does anything about
16 this application withdrawal?

17 MR. MORAN: No, Mr. Chairman, and as far
18 as I am able to tell the Minister doesn't
19 intend to either.

20 THE CHAIRMAN: To do anything?

21 MR. MORAN: That's right, except to
22 invite along with the rest of the
23 government the Panel to continue in an a
24 advisory capacity.

25 So as far as I am concerned, if

1 subsection (3) has any application, it can't operate
2 until there is a Minister's order and to my knowledge
3 there is no Minister's order.

4 Now that's not the interpretation which I
5 advance to the Board, but it seems to follow.

6 If that's the case, I think it lends
7 credence to the argument that a mere withdrawal --

8 THE CHAIRMAN: And if the Minister had
9 made an order in your submission it would not be
10 effective. Supposing the Minister had imposed terms
11 and conditions, you would say that that had no effect.

12 MR. HEINTZMAN: Well, I would say it for
13 two reasons. I would say, first of all it requires a
14 decision of this Board to terminate the hearing, (A);
15 and (B), if the Minister is going to give consideration
16 to terms of and conditions he must act in accordance
17 with the administrative law principles, with duty of
18 fairness, et cetera, et cetera. And he must consider,
19 must hear the parties as to whether terms and
20 conditions ought to be imposed, and he certainly hasn't
21 done that, or she hasn't done that.

22 I want to make it clear that I have not
23 yet made any submissions as to whether the Board should
24 terminate the hearing. I have directed my attention
25 solely to whether this Board has to make a decision of

1 whatever nature to permit the hearing to come to an
2 end.

3 THE CHAIRMAN: I took if from your
4 submissions, written submissions, that you weren't
5 consenting to it but you recognize that that might be
6 of the inevitable consequence of what has occurred.

7 MR. HEINTZMAN: Yes.

8 THE CHAIRMAN: I didn't take it that you
9 were advocating continuation of the hearing, but you
10 saw some merit perhaps in continuing.

11 I didn't think you were taking a strong
12 position one way or the other.

13 MR. HEINTZMAN: That's exactly right.

14 What I am taking a strong position on is
15 that you, as a Board, if you decide to terminate this
16 hearing, should give consideration very careful to
17 other proceedings and make sure that those are in place
18 before this hearing comes to an end.

19 THE CHAIRMAN: I understand you are
20 referring to the proposal for an advisory committee?

21 MR. HEINTZMAN: The inquiry process,
22 that's right.

23 We have made our submissions as to
24 whether this Board ought to proceed with the hearing on
25 three occasions, I think, last March, and the summer

1 and the fall, so I think the Board has our position on
2 that issue and we don't intend to reargue that point
3 before you.

4 I think those are my submissions. Thank
5 you.

6 THE CHAIRMAN: Mr. Rodger, you are coming
7 late on the scene.

8 MR. RODGER: Yes, I am, Mr. Chairman.
9 It's one issue having to do with process or procedure
10 that I would like to raise before we break for lunch.

11 THE CHAIRMAN: All right.

12 MR. RODGER: My brief submission is that
13 we should hold off from providing you with submissions
14 on the questions that you raised for this afternoon
15 until you decide the question raised this morning.

16 In Ms. Morrison's January 26th letter,
17 she stated that the issue to be dealt with today, as I
18 understand to be limited to today, was the question
19 raised of the Section 7(3) argument. And depending on
20 how you decide this question and Mr. Heintzman's
21 submissions, will certainly impact my client's decision
22 on to proceed hereon in. So I would request that you
23 decide the questions raised this morning first before
24 we get into other matters.

25 THE CHAIRMAN: We have a letter from Mr.

1 Poch, are you familiar with that letter?

2 MR. RODGER: That was the news release?

3 THE CHAIRMAN: No. It was a letter
4 addressed to the Panel criticizing the proposed
5 process.

6 MR. RODGER: Yes, I did receive that, Mr.
7 Chairman.

8 THE CHAIRMAN: I think we will like to
9 hear what people want to say about that this afternoon
10 and that's what we decided to do this morning, first
11 thing, as I understand it. It perhaps is not in a
12 sense a discrete issue from what we have been doing
13 this morning, but I think it might be helpful if we
14 gave parties the opportunity to make those submissions
15 before we dealt with the whole matter.

16 MR. RODGER: My concern, Mr. Chairman, is
17 that if you do find favour with Mr. Heintzman's
18 submission that a decision must be made, then I would
19 suggest that my client would be interested in also
20 making submissions as to how that decision should be
21 decided in terms of proceeding with the hearing or with
22 agreeing to the termination.

23 THE CHAIRMAN: I thought I made it clear
24 this morning that I wanted people to make those
25 submissions in conjunction with their submissions about

1 the ability of the Board to deal with the withdrawal
2 application.

3 MR. RODGER: Those are my submissions,
4 Mr. Chairman.

5 Perhaps I just mistook Ms. Morrison's
6 letter, but I thought today was going to be
7 restricted --

8 THE CHAIRMAN: When Ms. Morrison's letter
9 was sent out of course we didn't have a letter from Mr.
10 Poch.

11 MR. RODGER: Yes I appreciate that.
12 Thank you.

13 THE CHAIRMAN: We are adjourned now until
14 2:20.

15 THE REGISTRAR: Please come to order.
16 This hearing will adjourn until 2:20.

17 --Luncheon recess at 1:07 p.m.

18 ---On resuming at 2:25 p.m.

19 THE REGISTRAR: Please come to order.
20 This meeting is against in session. Please be seated.

21 THE CHAIRMAN: Mr. Campbell?

22 MR. B. CAMPBELL: Mr. Chairman, I am in a
23 situation that I had a fairly long-standing commitment
24 for later this afternoon. You will see me leave, with
25 your permission, in about 20 minutes, and hopefully I

1 can get back in time to listen to the conclusion. I am
2 simply assuming that you are sitting pass three o'clock
3 today.

4 THE CHAIRMAN: Yes, I think we will sit
5 past three o'clock if we have to. We want to deal with
6 the issue of terms and conditions.

7 MR. B. CAMPBELL: Yes. Ms. Harvie and
8 Mrs. Formusa will of course be here.

9 MR. MARK: Mr. Chairman, I am not sure
10 what the agenda exactly is this afternoon. I had not
11 expected this issue to be here today. I also have
12 another commitment unfortunately downtown later this
13 afternoon and can't make it back and I just ask for
14 your indulgence if I could be permitted to speak early
15 in the proceedings. I won't be very long at all.

16 THE CHAIRMAN: We have three people now
17 that have asked, Mrs. DeQuehen and Mr. Wright and now
18 you. But I think I would like to hear from Mr. Poch
19 first. This is all comes out of a letter that Mr. Poch
20 wrote on behalf of a number of intervenors, and that
21 may set the stage for what comes after that.

22 Let me get your letter, Mr. Poch.

23 MR. D. POCH: Thank you, Mr. Chairman.

24 Mr. Chairman, I should indicate for those
25 in the audience, there are two letters, both dated

1 January 27th, one I was elected to write on behalf of
2 eight coalitions representing 32 intervenors. It's a
3 very brief one-page letter, the other submissions on
4 behalf the CEG in which I asked for the opportunity to
5 speak today and outlined our position.

6 Mr. Chairman, just before I begin, Mrs.
7 DeQuehen on behalf Northumberland Environmental
8 Protection asked me to indicate to the Board that she
9 would have to leave early but that she wished their
10 endorsement of the one-page letter to be noted by the
11 Panel.

12 THE CHAIRMAN: I'm sorry, I didn't quite
13 follow that.

14 MR. D. POCH: Mrs. DeQuehen on behalf the
15 Northumberland Environmental Protection just asked me
16 to mention that the letter that I signed on behalf of
17 the eight coalition, 32 intervenor groups, they would
18 like the Board to note that they endorse the position.

19 THE CHAIRMAN: I see. Thank you.

20 MR. D. POCH: Mr. Chairman, I will try
21 not to repeat in its entirety the five-page submission.
22 I would like to touch on a number of comments made
23 there again, though.

24 I think it is worth repeating the
25 chronology from our perspective. There was a motion

1 before this Board to strike and the grounds were many,
2 but they did include Hydro's failure to meet the
3 requirements of the Environmental Assessment Act in
4 substance or in a procedural fashion, and further,
5 they, in effect, couldn't make their case on the
6 evidence. And as I indicated to the Board, we felt
7 very strongly that to continue would involve a breach
8 of natural justice.

9 We have not the opportunity to argue that
10 motion, I am not going to argue it this afternoon, but
11 we believe we are entitled to presume, given the
12 withdrawal the night before the motion is to be heard,
13 and we should take it as a starting position that we
14 should be entitled to discuss the merits of the
15 subsequent process, as if we had won that motion or
16 would have.

17 Now I appreciate I am not asking the
18 Board to make a determination on that point and I am
19 not asking Hydro to concede that interpretation, but I
20 believe having been denied the right to argue that
21 motion, we are entitled to have that perspective, and
22 so to the public might quite rightly take that
23 perspective.

24 So we have a proponent and the government
25 who are of course --

1 THE CHAIRMAN: As Mr. Greenspoon says, in
2 one of the many scenarios that this hearing continue,
3 the Northwatch motion may spring up again.

4 MR. D. POCH: I would consider that a
5 certainty, Mr. Chairman.

6 THE CHAIRMAN: I don't think any one
7 denied that the right -- it was the intervening
8 circumstances that made --

9 MR. D. POCH: Mr. Chairman, please don't
10 misinterpret. I am not criticizing the Board for not
11 spending several days hearing that motion given the
12 withdrawal. I am just indicating that since we haven't
13 had the opportunity to argue that motion, and since the
14 withdrawal obviously was to some extent, at the least
15 the timing of it, precipitated by that motion, we take
16 the view that -- we argue today from the premise that
17 we would have or we should have, we presumed that we
18 would have won or could have won that motion.

19 So the situation stepping back from the
20 perspective of the public, if you will, and from our
21 perspective, is that you have the proponent and the
22 government who obviously the proponent is to some
23 extent an agent of, faced with the prospect of at least
24 the prospect of losing that motion, the eleventh hour
25 pulling the plug at the hearing and then asking you,

1 the very people who have functioned as the EAB, to now
2 switch hats, carry on, not just carry on and open an
3 inquiry, but have regard to the record that was heard
4 wearing your EAB hats, and, in effect, make a decision,
5 although not a decision which is an approval under the
6 Act, on many, if not at all of the issues that you
7 would have been called upon to decide had the hearing
8 concluded as an Environmental Assessment Act
9 proceeding. This despite the fact that it is at least
10 in our presumption likely that Hydro has not met the
11 requirements of the Act, to continue with these
12 proceedings would have been a breach of natural
13 justice. So we say this amounts to an abuse of
14 process.

15 They are, in effect, trying to get some
16 of what they couldn't get through the front door,
17 through the back door. Obviously they can't have the
18 whole cake any more. But if they are asking you to
19 carry on and render some advice, there is presumably a
20 purpose for asking you to do so. They intend to have
21 some regard to that, place some reliance on it.

22 Now we certainly understand the desire to
23 attain as much value as is reasonably possible from the
24 investment that has been made in these hearings,
25 investment both in terms of money and investment of

1 everyone's time, not the least of the panel's time.

2 But in short, our position is that any further value
3 that could be obtained, that pales compared to the
4 damage that is likely to be done if you were to carry
5 on, if you were to accept the invitation.

6 First of all, we see the message being
7 given to public and to other tribunals as if it's going
8 awry for the public sector proponent, the government
9 will be prepared to step in and just change the rules,
10 let it carry on not as a quasi judicial proceeding, a
11 constrained proceeding. We cannot know what impact
12 that would have, but it may make the whole notion of
13 applications for early dismissal moot.

14 [2:33 p.m.]

15 Everyone will say, what is the point?
16 All we will do then is have to carry on, except we
17 won't have the rights that we had before as
18 participants.

19 Mr. Chairman, I would like to turn to the
20 topic of the unfairness we see that would be engendered
21 by the approach proposed by the government.

22 This Board has sat for two years roughly
23 hearing Hydro's perspective, Hydro's perspective tested
24 quite clearly for much of that time. Now, in a period
25 of a few brief months, you will be asked to turn your

1 attention -- you would turn your attention presumably
2 to the differing views of the however many other
3 parties there are, some hundred presumably.

4 In addition, in the next few months you
5 will be called upon to write a report, which is a task
6 that is an unenviable one in terms of its proportions.
7 I can certainly think the Board would want to reserve
8 for itself several months to do so, and if the parties
9 were to be given any opportunity to make comprehensive
10 written submissions for your benefit before you started
11 on that task of writing they would need some weeks if
12 not months. So there are very few weeks in the
13 proposed schedule for the Board to be able to convene
14 whatever inquiry, active inquiry it would choose to
15 convene.

16 Obviously -- and, Mr. Chairman, you quite
17 candidly acknowledged this on Tuesday. You wouldn't
18 pretend to suggest that we would carry on in a hearing
19 mode with the traditional adversarial process, but I
20 would say obviously, equally obviously, if you were to
21 hear from any experts at all you would have the
22 unenviable task of having to select which experts you
23 wanted to hear. You couldn't hear everybody. You
24 couldn't hear all the witnesses, even in chief, all of
25 the individuals and the Native Elders, the experts

1 retained by the various parties.

2 The prospect of your having to select
3 from them is, I would suggest, not a pretty picture in
4 terms of how it would be viewed by those parties who
5 aren't able to have all of their spokespeople and
6 experts have their say.

7 We as groups that have invested
8 tremendous time and energy thus far would be denied the
9 opportunity to test the evidence that will be, has been
10 filed or would be presented by those who we view as our
11 opponents in these cases.

12 AECL has filed their evidence and we have
13 filed ours, and Mr. Heintzman and I would have the
14 situation facing us where we would have no real
15 opportunity to challenge the opposing point of view.
16 There are no doubt many instances in -- we certainly
17 feel there are many instances in Mr. Heintzman's
18 witnesses' briefs, they made bold assertions without
19 the data; I'm sure he feels the same about ours. And
20 that would not be tested, nor would we have the
21 opportunity to have our own evidence withstand trial by
22 fire so that it would attain the stature that Hydro's
23 evidence to the degree it has survived has attained.
24 It will not be tested evidence.

25 Now, I know this Board would do its best

1 to keep an open mind. It would not be obliged any
2 longer to be bound by the fine legal distinctions of
3 what is evidence and what is not tested evidence and so
4 on, but I think it would be an unavoidable problem for
5 you that tested evidence would naturally have a greater
6 weight in your mind, and even if you can overcome that
7 I'm sure the public's perception would be that that
8 would be the case.

9 I think it fairly clear that there would
10 not be funding or the timing for a funding mechanism
11 available to allow a group such as ours to update any
12 evidence that we have produced, and if you have had any
13 opportunity to look at the evidence filed you will see
14 that much of it is based, if you will, as a
15 counterproposal in parallel with Hydro's original 1989
16 plan. And we were in the midst of negotiating with
17 Hydro, subject to the Board's subsequent right whether
18 to approve or not an intervenor funding, a
19 supplementary funding plan to allow our experts to some
20 extent to put an up-to-date spin on that in light of
21 the events that we have seen.

22 I don't think we can understate the
23 magnitude of the events that have transpired in the
24 last few months. I think it was perhaps nowhere more
25 clear than when at the conclusion of Hydro's Panel 11

1 Dr. Connell asked the witnesses whether it was -- which
2 was the primary or the more major factor in the change
3 of plans, the "load" cause or the "rate level" cause,
4 and the witnesses said it wasn't simple, but basically
5 they said the rate level cause was more pressing.

6 That is a very major change in Hydro's
7 approach, and I would have argued this at length in the
8 motion, but I think that perhaps it is clear enough
9 left at that.

10 We would have wanted to update our
11 evidence to show you what a DSM plan optimized for rate
12 level considerations would look like as compared to
13 Hydro's. We may or may not have been able to get
14 funding to do that. It may have been impossible for us
15 to do that in the time, and that would have been one of
16 our natural justice arguments in the motion. It is
17 certainly not going to be possible, wouldn't be
18 possible to do that in this advisory committee process.
19 The time is simply not there even if the money would
20 be.

21 Now, in contrast you will note, for
22 example, MEA -- and I'm pleased to see that MEA is
23 supporting the position I am putting forward today, Mr.
24 Chairman, but if we were to proceed, MEA hasn't filed
25 some of their major documents, their integration

1 evidence for example, precisely - and they have been
2 very clear - because they want to be able to update it
3 and respond to the changes that have occurred, and
4 presumably were in the process of doing so.

5 So we will have a situation where if they
6 and we did choose to participate, which is unlikely so
7 this is I guess a hypothetical, you would have updated
8 evidence from one party but not from another.

9 Mr. Chairman, had the motion been argued
10 I would have been making the point that our cross-
11 examination, our discovery, our evidence and our
12 funding were all based on a different reality than what
13 faces us, what faced us in the last few weeks of this
14 hearing, and these would have been arguments raised
15 under the rubric of natural justice for a
16 discontinuation of hearing, and I would suggest to you
17 that those arguments have no less relevance to the
18 proposal to carry on based on the record as it exists
19 today wearing any other hat, be it judicial,
20 quasi-judicial, advisory, what have you. It is simply
21 unfair in the common use of the word.

22 Now, we have highlighted in our
23 submissions this question of the potential denial of
24 rights to intervenors in subsequent proceedings. The
25 government and Hydro have not, and I presume would not,

1 assure us that they will not seek to avoid need and
2 rationale hearings on for example the northern
3 hydraulic projects.

4 It will be very tempting for them if they
5 have any kind of a report from you to say, well, there
6 hasn't been an environmental assessment hearing, we
7 have the benefit of this report - however flawed some
8 of us may believe it must inevitably be - and so it
9 will be very tempting for Hydro to apply and for the
10 government to grant an exemption for the need aspects
11 of any subsequent applications.

12 Mr. Campbell did nothing to put us off
13 that scent when on Tuesday he said they are carrying on
14 as they have -- and he reminded you they have already
15 filed these EAs. Well, of course, the EAs they have
16 filed do not address the question of need and
17 rationale. They take it as a given as if it had been
18 decided in these proceedings. He didn't indicate that
19 they would be pulling those applications and refiling
20 or amending them so as to capture the question of need.

21 I would gain some comfort if today Mr.
22 Campbell and the government could stand up and promise
23 everybody in this room that they would not seek to go
24 that route, and I will be pleasantly surprised if they
25 do that.

1 So particularly for those groups and
2 citizens who are under the gun of any of those
3 applications, they are really at heightened risk.

4 Now, we have listed as a concern the
5 potential violation - I add the word 'potential' - of
6 Section 18(1) of the Environmental Assessment Act,
7 which functions to stop any EAB member being in the
8 employ or employed in the public service of Ontario and
9 in the employ of any ministry.

10 We have asked the Panel if you could at
11 some point advise us as to what the proposed
12 administrative structure is and when we asked for
13 remuneration we weren't asking to know the amount but
14 just the source, to know whether this is in fact
15 technically made out as a concern.

16 Presumably somebody in government will be
17 creative enough to think of a way of doing this without
18 breaching the fine wording of the Act, but I am really
19 here today not to argue about whether or not it is
20 likely that the narrow wording of Section 18(1) is
21 inevitably going to be breached or whether a way can be
22 found around it or not. I think the policy behind that
23 section and many sections like it in other statutes is
24 to reinforce the independence of administrative
25 tribunals.

1 Now, it can be argued, well, that has no
2 application, you won't be functioning as an
3 administrative tribunal. But certainly what we have
4 here, three currently members of the Environmental
5 Assessment Board, including its permanent Chair, who
6 will go on to write a report, the bulk of the evidence
7 they will have heard sitting as Environmental
8 Assessment Board members, and will do so despite a
9 presumption, which I think we are entitled to have,
10 that the evidence would not have cut the mustard under
11 the environmental assessment rubric.

12 So I would suggest however it is
13 structured there is the concern that the integrity of
14 the Board, the independence of the Board, the
15 perception of the Board's independence is gravely
16 imperilled, and indeed, if you were asked to carry on
17 in some quasi-judicial capacity in some other statute I
18 think there would be little doubt that an application
19 for disqualification would succeed.

20 I think that the fact that that would not
21 be how the proceeding would be styled doesn't diminish
22 the concern that there be appearance of a truly
23 non-biased process and a process that respects the
24 requirements of the environmental assessment.

25 THE CHAIRMAN: Just to understand, the

1 disqualification would be disqualification to serve on
2 the Environmental Assessment Board, wouldn't it? It
3 wouldn't be a disqualification to be on the advisory
4 committee.

5 MR. D. POCH: Clearly structured as an
6 advisory committee you wouldn't face that risk. I was
7 just suggesting if we imagined that the -- if we were
8 in a different scenario where you were to be appointed
9 say under the Public Inquiries Act or some such --
10 wearing a quasi-judicial mantle, though not the EAB
11 mantle, I would think that anybody would be able to
12 stand up and say, whoa, these are the same people that
13 heard a whole bunch of related evidence in another
14 proceeding which was an aborted proceeding and where
15 different rights were available to other of the parties
16 and not to me here. And that would clearly be a great
17 difficulty.

18 Now, that is not the challenge that can
19 be made to you as an advisory unless of course it is
20 argued, and it might be, and I don't shy away from the
21 possibility of arguing it myself, that really what is
22 going on here is this hearing is continuing, just
23 continuing without any of the pretensions.

24 I think all of these are concerns we
25 have, and even if you are confident that you can

1 overcome the embedded concern of unfairness that we
2 raise I would suggest that even the perception is a
3 problem which should dissuade you from the path that is
4 being pressed upon you by the government.

5 Now, there are concerns which are not
6 with respect to -- further concerns which are not with
7 respect to the integrity of the process or the fairness
8 of the process per se but the wisdom of the proposed
9 inquiry in a plain sense.

10 We saw Hydro to the eleventh hour
11 claiming that what it was doing, what it was continuing
12 to do was all still within its same planning rationale.
13 There were some what they styled 'technical changes',
14 but it was fine, we were still doing the same thing.
15 Circumstances had changed, we were reacting within the
16 recipe, the same recipe; we were -- just the context
17 has changed, that is all that has happened.

18 Look at the dramatically different result
19 that has occurred.

20 What you would be asked to do -- you
21 couldn't possibly deal with the minutiae of striking an
22 actual plan, and these are the submissions I would have
23 made on the motion, indeed had you been asked to carry
24 on as EAB members. You couldn't -- at this point, at
25 this stage, given all that has changed, it would be

1 extraordinarily difficult to strike an actual detailed
2 plan.

3 Hydro -- you know, I would have given you
4 the list of 20 studies that aren't available yet or
5 decisions that still had to be made that they weren't
6 going to ask you to make, they were going to make and
7 weren't going to tell you which way they were going to
8 amek them and weren't offering to let you make them.

9 The permutations and combinations were
10 great. It would have been a very difficult task. You
11 could at best have given some general guidance to the
12 planning approach, perhaps to the priority, and that is
13 presumably all you would be able to do wearing this
14 other hat.

15 I argued in our written factum for the
16 motion, and argue today, that that is a fairly
17 dangerous course to take given the demonstration we
18 have had of how dramatic the changes that can occur on
19 the ground in terms of what projects Hydro is planning
20 to do and what projects they are planning not to do.
21 Supposedly within that same -- any given, either the
22 given general planning approach Hydro took or the one
23 that you would ask them to substitute to the extent it
24 is different.

25 A member of the public won't know,

1 wouldn't -- given the history now would have no reason
2 to know what the real impact is going to be on them,
3 and so we say the way to assess Hydro's plans is by
4 reference to not just the planning concepts but to the
5 plans themselves, because it is only by reference to
6 the plans themselves that you can gauge the true
7 impacts, and certainly it is only by reference to the
8 plans themselves that the public can gauge the true
9 impact and evaluation -- evaluate the proposal.

10 [2:53 p.m.]

11 I think that is a dangerous course to
12 follow in any event.

13 We have indicated we believe that if
14 this process continues, the transformed process occurs
15 it will forstall needed regulatory reforms.

16 This is certainly a policy argument in
17 the pure sense, but I think the Board will be aware
18 that that has been a concern of many of the parties.

19 There was strong motivation expressed in
20 November when we have tried to do an alternative
21 dispute resolution approach. I think it is apparent to
22 everybody that the current episodic mega plan, mega
23 review approach, which is not new - it's new in that
24 it's under the Act was going to be binding perhaps for
25 the first time - but it is not new in the sense that

1 Dr. Porter and others have preceded you, that that is,
2 given the dramatic changes we see, given uncertainties,
3 not the ideal. And that there are are many proposals
4 floating around for what would be a better process that
5 would capture the benefits of both the Environmental
6 Assessment Act and a more frequent and flexible
7 regulatory oversight.

8 But I think it would be at this late
9 stage very difficult for these proceedings to be
10 transformed into that discussion, it's a very different
11 discussion than what has occurred, and we think it's a
12 discussion which is most timely given the dramatic
13 changes that Hydro is looking at making. We believe
14 that many of those dramatic changes you will not have
15 an opportunity to wrestle with in the next months.

16 So the best for the public that we could
17 do is move quickly to putting in place a regulatory
18 structure as soon as possible so that it can capture at
19 least some of those decisions as early as possible in
20 the future.

21 Mr. Chairman, we understand there is a
22 perception in some quarters, I think the headline was
23 \$57 million wasted, we strongly disagree with that
24 sentiment. We think that the public has received
25 tremendous value from the hearings, from the bulk of

1 the hearings that transpired.

2 We think that while certainly much of the
3 change in Hydro's approach and plans is a result of the
4 change in the environment, the economic environment.
5 We think Hydro's recognition of the need to change its
6 plans has been dramatically speeded, that this hearing
7 has been a catalyst. That we have - I think the words
8 I used were - pryed the lid off and the information has
9 flowed. That has been very healthy and that the public
10 has saved billions, many billions perhaps. But
11 certainly that the decision-making process has been
12 speeded and even that much earlier a decision of
13 Ontario Hydro, as we are all acutely aware with the
14 interest clock ticking, is a saving of many millions.
15 And I think that the process has worked and should be
16 credited as such.

17 We were concerned that the extension of
18 this process in whatever form would no longer provide
19 those benefits. That the benefits of that type I think
20 we have consolidated as best we can at this point, and
21 what is needed now is a substitute process for and in
22 an ongoing fashion.

23 What is needed now, I would add, is that
24 the integrity of the process be protected. The
25 integrity of the Environmental Assessment Act and of

1 the Environmental Assessment Board be protected. And I
2 urge you that participation in a constrained, rushed,
3 unprotected proceeding risks that integrity and risks
4 the benefits we have obtained.

5 Those are my submissions, Mr. Chairman,
6 unless there are any questions.

7 DR. CONNELL: Mr. Poch, you seem to be
8 making some assumptions about the nature of the
9 proposed advisory committee process which have not so
10 far taken root in my mind. In particular, you seem to
11 assume that by this process Hydro would in some way be
12 empowered to do something which it is now not able to
13 do.

14 MR. D. POCH: I don't assume that in
15 strictly -- in the narrow legal sense; I assume that in
16 the political sense and with perhaps with legal
17 repercussions in the sense that it lowers the threshold
18 for exemptions, for example, or partial exemptions.
19 It's a great concern that we have.

20 DR. CONNELL: When you refer to political
21 changes, you mean through actions that might be taken
22 by the government, but obviously the government might
23 take such actions anyway with or without and advisory
24 committee.

25 MR. D. POCH: Clearly. And other

1 advisory committees have preceded you and arguably some
2 decisions have been made based on their records.

3 I am suggesting when you issue an
4 advisory committee report, having heard two-thirds of
5 the evidence or half the evidence wearing an EAB hat,
6 it is that much more tempting for a government to say,
7 oh, well we really don't need to have a proper EAB
8 proceeding for this site-specific proposal because even
9 though this wasn't an EA decision and even though half,
10 only half of the case was heard under that, well, it
11 really was the EA Board. And so it's a lot more, I
12 think it would has been lot for tempting, and that we
13 think would be a great mistake on the government's part
14 and should not be encouraged and would reflect poorly
15 on the Act and on the Board.

16 DR. CONNELL: So I take it then that that
17 view is based on conjecture as to what the advisory
18 committee might do, what it might report, and indeed
19 conjecture on how the government might react to it.

20 MR. D. POCH: Yes. I think I am
21 presuming that they will want to, to some extent rely
22 on the report. On the other hand, the other scenario
23 is that they simply ignore the report, like many have
24 been ignored in whole or in part in the past, in which
25 case I am left with the argument that why waste

1 millions.

2 DR. CONNELL: Isn't however exactly the
3 reverse also possible, that is that the report may
4 enjoin the government to be even more rigorous and the
5 government might agree to be abide by that advice.

6 MR. D. POCH: Certainly. I think what I
7 am suggesting is no matter what the report says, there
8 will be those in the this room who will feel hard done
9 by. Somebody is going to feel they lost, they lost the
10 argument and it wasn't a fair fight.

11 I think that inevitably the report will
12 be challenged as being a report from a flawed process,
13 and that that will not reflect well on the Board
14 either.

15 DR. CONNELL: But ultimately it's not
16 really a question of who wins and who loses, but it is
17 a question of good public policy; is it not?

18 MR. D. POCH: And good process. And that
19 is indeed the kernel of my argument, that it is a
20 flawed and rushed and compromised process. It's a
21 process designed at the 11th hour. It is a mix of this
22 and that. It's a process that's been designed without
23 any consultation, I hasten to add, because it's often
24 assumed that some parties in this room have some
25 access. I am unaware of any party in this room, any of

1 the intervenors who were consulted by the government
2 before they started to decide on the format and form
3 and scope of these discussions, we are quite
4 dissatisfied with that process.

5 DR. CONNELL: Thank you.

6 THE CHAIRMAN: Did I understand when you
7 said Mrs. DeQuehen - I see she left - did she intend
8 not to make any submissions? Is that your
9 understanding?

10 MR. D. POCH: I think that was the
11 indication she gave me. She couldn't stay, she
12 apologized. She had a train to catch and just that she
13 wanted her groups's accord with the short letter.

14 THE CHAIRMAN: Thank you.

15 Mr. Wright, you wanted to make your
16 submission now? You were one of the people that wanted
17 to speak early, I believe.

18 MR. WRIGHT: Thank you.

19 MR. D. POCH: Thank you, Mr. Chairman.

20 MR. WRIGHT: Good afternoon.

21 I would like my Northwatch submissions to
22 be switched to this issue as a written submission. I
23 don't know if that's possible.

24 Emotionally I support Mr. Poch's groups.
25 Pragmatically because my issues are all people issues,

1 they are not technical issues, and they affect how
2 people feel and live, I accept an advisory committee as
3 the best of a bad option.

4 As I said this morning, I would like to
5 see an orderly winddown, with a report, of the hearing,
6 and I leave it to your consideration.

7 Thank you.

8 THE CHAIRMAN: Mr. Mark?

9 MR. MARK: Mr. Chairman, just before I
10 turn to my substantive submissions, I would urge the
11 Board, that although, Mr. Chairman, you have asked for
12 the submissions on both issues we have heard of today
13 together, I suggest to the Board that they are legally
14 distinct issues, and I would urge the Board to ensure
15 that it makes its decision on this morning's issue
16 without regard to the matters that are discussed this
17 afternoon. One is irrelevant to the other.

18 Your decision on whether or not the
19 hearing should be terminated, whether Ontario Hydro
20 should, (A), be permitted to withdraw and (B), if your
21 leave is required, whether it should be granted is
22 separate and distinct in my submission from the
23 discussion we are presently having about the wisdom of
24 the government, establishing you or, for that matter,
25 any other group of people as an advisory committee, and

1 I would just urge you and request that you bear that
2 distinction in mind.

3 Mr. Chairman, you have my written
4 submissions. I won't repeat them in my oral remarks, I
5 want to restrict it to a few more general points.

6 In general terms, I am supportive of the
7 points Mr. Poch has raised. I think he is expressing
8 in some detail the elements of what has gone on and
9 what frankly - and I say this with the utmost respect
10 to everybody - makes the proposal somewhat offensive to
11 I think people's nature and people's impression about
12 how public policy decision-making ought to work in this
13 province.

14 The province has over the years gone to
15 considerable lengths to institute pieces of legislation
16 such as the Environmental Assessment Act precisely for
17 the purpose of ensuring that proper bodies with proper
18 procedures and proper opportunities for considering the
19 evidence are available to the public.

20 Here we have a proposal whereby what is
21 sought to be achieved is, have the same objective of
22 the environmental assessment of the DSP fulfilled by a
23 different body with no defined statutory role, after
24 the proponent has itself said that the Board's
25 decisions on those matters are irrelevant to its

1 purposes. That to my mind, Mr. Chairman, is to invite
2 mischief.

3 Ontario Hydro you will recall, Mr.
4 Chairman, has always had, since the Update, has always
5 had the option available to it of proceeding with
6 site-specific hearings and terminating this proceeding.
7 It declined to do so because it trumpeted that it
8 wanted the views of this Board not only on the strict
9 question of the the approvals, but all the necessary
10 issues along the way, the very ones that the government
11 now proposes be before this advisory committee, the
12 role of demand management, how we account for
13 environmental and social costs and planning. So the
14 government and Hydro, and I think we can treat them as
15 being one for the purposes of today's discussion,
16 decided that it was not going to withdraw the
17 undertaking because because it wanted those issues
18 decided in the very procedure it started some years
19 ago.

20 For various reasons that none of us are
21 here privy to, they have now decided that having those
22 issues decided are irrelevant to Hydro's purposes. And
23 it is unseemly, in my submission, for them to put the
24 same issues before a Board or a tribunal or a committee
25 which is not functioning under the rubric and

1 safeguards of the EAB which three years ago was felt by
2 the government to be the appropriate forum for the
3 disposition of these issues.

4 Mr. Chairman, as listened the last few
5 days and this morning to the arguments by AECL on the
6 one hand about what should be done with this hearing,
7 and the arguments of the proposal of the government on
8 the other hand, I was driven to laugh at one point, and
9 just reminded perhaps of what should be basic fact.
10 And I guess human nature has difficulty dealing with
11 death. People don't like to dealing with death. It's
12 a difficult issue. But I think one thing is true: If
13 its dead, leave it buried. And I say this seriously,
14 it's an analogy but it's serious.

15 AECL on the one hand with the scientists
16 wants to try and perform heroic measures on the body,
17 it wants to invent new heroic measures and it thinks it
18 can recreate it as some other form of life to continue
19 on in this proceeding.

20 The government, on the other hand, not
21 being the same sceintist takes a more spiritualistic
22 approach. They say we don't care if it dies, we will
23 just resurrect it. And either one - I may be slightly
24 humorous, Mr. Chairman - but I think the point is this:
25 when you try to do that one is inviting disaster, one

1 is inviting trouble.

2 By Hydro's own position, by the
3 government's consent, they acknowledge that the purpose
4 of this enterprise and the plan which underlay it is
5 dead. It is best off left dead. To try and resurrect
6 it in some other format is only to invite dissension,
7 it's only to rancour, it's only to invite the risk that
8 what you recreate is flawed by the process of its
9 recreation.

10 This Board, Mr. Chairman, should
11 ultimately be concerned with the integrity of the
12 process. Whether you reconstitute yourself as an
13 advisory panel, you ultimately will be deciding the
14 issue before you on the basis of whether it's in the
15 interests of Ontario having regard for to the purpose
16 for which you were originally constituted, that is as
17 an Environmental Assessment Board.

18 What is being sought to do here is to do
19 indirectly through a process not authorized by the
20 legislation, what is no longer sought to be directly,
21 get done directly in a process in which everybody
22 investigated much, time money and energy, and a process
23 which was thought by all to be the most appropriate one
24 for making the decisions.

25 You risk having a lack of credibility in

1 whatever report is produced if another procedure is
2 adopted.

3 Secondly, Mr. Chairman, I ask you not to
4 forget - and Mr. Poch has urged this point on you in a
5 somewhat different fashion - but I ask you not to
6 forget that there was pending before you the motion to
7 have the case dismissed. That motion was founded on
8 the premise that the environmental assessment, being
9 both the original filing and all the evidence taken to
10 date, to the conclusion of Hydro's case, that the
11 environmental assessment, that is the evidentiary
12 record, was an insufficient basis for sound
13 decision-making on these matters. I appreciate you
14 haven't decided that, but I respectfully suggest that
15 that motion which had the support of a significant
16 number of substantial intervenors in this proceeding,
17 representing a broad spectrum of public interest, that
18 the fact that that issue was unresolved can only serve
19 to detract from the credibility of any task you
20 subsequently undertake, because if there is a real fear
21 that the record put before you by Ontario Hydro in this
22 proceeding was not a sound basis for a decision-making,
23 it cannot get any better by whatever you do wearing
24 your hats as the advisory committee. And I suggest to
25 you, you will just add another debate to the record,

1 that is whether there is a reason to believe that the
2 report you ultimately produce will be any freer of the
3 flaws which say would have been inherent in any report
4 you produced in this proceeding.

5 The next point, Mr. Chairman, is that I
6 suggest to you the opposition you are seeing today to
7 this proposal is itself something you ought to have
8 regard to in considering whether you will accept the
9 government's proposal.

10 The government and Hydro having chosen
11 not to go by the environmental assessment route and now
12 seeking some recommendations or decisions on many of
13 the matters which were before you in that capacity, I
14 suggest, Mr. Chairman, that that process can only be
15 useful and should only be seen by you as being useful
16 if it enjoys a large measure of support amongst the
17 public and amongst the stakeholders, stakeholders in
18 the issue of electricity planning in this province, and
19 I think you can take it that they are in large measure
20 represented by the groups before you. And I submit to
21 you that as long as there are a significant number of
22 them that express the very strong recommendations about
23 the procedure, you must be concerned that it is not an
24 appropriate enterprise to be undertaken.

25 Lastly, Mr. Chairman, I want to deal with

1 the question which is suggested to underlie the concern
2 of the politicians who have put this issue before you,
3 which is the desire they say to have something of value
4 out of this proceeding.

5 [3:14 p.m.]

6 I concur with Mr. Poch, Mr. Chairman. I
7 think that is a politically expedient position that the
8 government has taken. In my respectful submission, we
9 already have achieved from this process the value we
10 can. Mr. Poch has expressed his view about in terms of
11 forcing Hydro to open itself up to review. I look at
12 it somewhat differently.

13 What is of value, Mr. Chairman, are the
14 reports and the evidence and the opinions and the
15 testimony of both the experts and the lay people who
16 have appeared before you. That is what is important.

17 The recommendations of three people or
18 five people or one person sitting in whatever capacity
19 is in my respectful submission not the critical measure
20 of value of these proceedings. Those recommendations
21 were legally necessary for Hydro to get where they
22 wanted to go, but the value, I suggest, is creating the
23 record which has been created, and it is that record I
24 suggest, Mr. Chairman, which will serve the public best
25 over time and not recommendations made today in

1 circumstances where even the proponent itself says the
2 decisions aren't necessary.

3 In my submission, future generations are
4 best served by ensuring that we preserve the record so
5 the people can apply them to the circumstances in the
6 future and not have it, and not be sent along the false
7 path, I suggest, of being forced to look at
8 recommendations made by a committee when that is not
9 what is critical to the issues facing Ontario Hydro
10 today.

11 Ultimately, even your report as members
12 of the Environmental Assessment Board was in a sense
13 only recommendatory because the Minister was at liberty
14 to make whatever order he wanted, Mr. Chairman.

15 The government some years ago decided
16 that for purposes of obtaining those recommendations
17 the government wanted this procedure. It is asking in
18 this advisory panel for no more or less from you than
19 recommendations on those same issues, and I suggest,
20 Mr. Chairman, that the public interest would not only
21 be best served but would be seen to be best served if
22 you decline that invitation.

23 Subject to any questions those are my
24 submissions.

25 THE CHAIRMAN: Thank you, Mr. Mark.

1 MR. MARK: And with your permission, Mr.
2 Chairman, I will withdraw at this point.

3 THE CHAIRMAN: Yes.

4 MR. MARK: Thank you.

5 THE CHAIRMAN: Are there any
6 representatives of the parties who supported Mr. Poch's
7 letter who wish to make further submissions?

8 Mr. Shepherd? Mr. Shepherd, you can go
9 first.

10 Mr. Mattson, you were on your feet
11 before. Have you got some special problem?
12 [Laughter.]

13 MR. MATTSON: No, I just thought I would
14 be the next person called forward.

15 THE CHAIRMAN: All right. Mr. Shepherd?

16 MR. SHEPHERD: I suspect we all have lots
17 of special problems. [Laughter.]

18 Mr. Chairman, in general I support the
19 positions that Mr. Poch, and I do not intend to repeat
20 them.

21 I wish to deal with only one issue, and
22 that is the question of natural justice, and I want to
23 put it to you in a somewhat different way that Mr. Poch
24 did.

25 First let me deal with Dr. Connell's

1 comment that in order to have this discussion we have
2 to make certain assumptions about what this thing that
3 is proposed is going to be, and I guess I should say
4 straight off that it is clear to me that if this Board
5 were to say to the government we will proceed to be an
6 inquiry but the condition is that it has to be exactly
7 as we would have done it as the EAB, no change, we will
8 hear whatever evidence we would have heard as the EAB,
9 we will consider all the things we would have
10 considered as the EAB, and we will let you know when we
11 are ready to make a report at exactly the same time as
12 we would have as the EAB, I think it is fairly clear
13 that if this Board was proposing to do that with all
14 the paraphernalia that go around with that you can
15 safely ignore every other thing I have to say. You may
16 be able to safely ignore that anyway, but that is a
17 different issue.

18 However, Mr. Chairman, on Tuesday at the
19 end of the day you made the comment, which I think made
20 it quite clear, that that is not a possibility.

21 Your comment was to the effect that
22 whatever happens with this new inquiry participation
23 will be less, there will be changes, and I think that
24 having been said and assuming that you don't choose now
25 or at some point to say no, that's wrong, I think that

1 is the end of that matter. We are not going to have an
2 inquiry that complies with all of the superstructure or
3 infrastructure that an EAB hearing would entail, and my
4 comments are made on that assumption.

5 That leads me to the second point. The
6 second point is the basic justification for proceeding
7 with some form of inquiry is a sort of a 'half loaf is
8 better than none' approach. Well, you know, it is
9 expensive, and it takes a long time, and things have
10 changed and everything, so maybe we shouldn't finish
11 what we are doing, and the proponent doesn't want it
12 any more anyway and the government doesn't want it any
13 more anyway. But we should have something, so half a
14 loaf is better than none.

15 It is my view that sometimes half a loaf
16 is better than none, but sometimes the only way to do
17 something is to do it right, and if you don't do it
18 right you shouldn't do it.

19 For example, when the Supreme Court of
20 Canada said to the criminal courts in this country in
21 the Askov case we don't accept that you can have a
22 delay like this and still mete out justice, did the
23 courts respond by saying, well, what we will do then is
24 we will do all this stuff a lot faster and we won't
25 give the defendant all the rights he is entitled to, or

1 did it say: If we can't do it properly and fast we
2 won't do it? Because that is what the rule of law
3 says: There are certain things that you have to do a
4 certain way or it is simply not right, it is not the
5 way our system works. So sometimes half a loaf is not
6 better than none, and this is one of those cases.

7 My basic argument, and this is my third
8 and final but longest point, is that what is at issue
9 here is the principle of audi alterem partem. It is
10 the principle you must hear both sides to make the
11 decision. It is a fundamental principle of natural
12 justice.

13 In order to do that if you treat the case
14 before you, if you like, as one side and another side
15 in a simple lis then you can't say, well, for this one
16 side we will have this set of rules and for this other
17 side we will have this different set of rules. The
18 principle of audi alterem partem would say you can't do
19 that, it is wrong; it breaches our notion, our legal
20 system's notion of what is fundamentally just.

21 In order to reach this point I want to
22 give you two examples.

23 The first example is this. Let us
24 suppose that what was proposed right now was not that
25 this hearing end per se - that is, we are not going to

1 change the name of what we are doing, we are going to
2 keep the same name, but what is proposed is that we are
3 going to have some new set of rules with less
4 participation and maybe we won't have cross-examination
5 because it takes too long and it is too expensive, that
6 sort of thing, is there any question that the principle
7 of audi alterem partem would be breached?

8 Even aside from the rules in the
9 Environmental Assessment Act if somebody went to the
10 Divisional Court and said they shouldn't be allowed to
11 do that, it would be like -- we don't need to hear from
12 the people before us, it is pretty obvious.

13 But I think that a better example -- and
14 then, of course, the point of that is you can't change
15 the name of it and say, well, now it is okay. If it is
16 wrong one way, changing the label doesn't make it
17 right.

18 But the second example is perhaps a
19 better one.

20 I would ask the three members of this
21 Panel to determine for themselves, if the government
22 came to you in 1990 and said, listen, here's what we
23 want to do. First, we want you to spend two years
24 hearing all of Hydro's evidence, we want you to have
25 full oral evidence, full cross-examination, full

1 discoveries, and then what we want you to do as soon as
2 that is over is we want you to change the rules and we
3 want you to not hear full oral evidence, not have full
4 cross-examination and not have full discoveries and
5 make a decision.

6 Would any of you have accepted this
7 appointment?

8 The answer is you would not have, you
9 would have been embarrassed, and you would have said to
10 the government, "You must be kidding." The fact is --
11 and I will put this to you in as personal terms as I
12 can.

13 The fact is if the Members of this Board
14 were to accept the government's invitation I would ask
15 you, Mr. Justice Saunders, can you seriously go back to
16 the Divisional Court after that and say to your fellow
17 judges, yes, we finessed around fundamental justice
18 there, we changed the name and so we didn't have to
19 follow the rules?

20 Ms. Patterson, in the process that you
21 are now looking at of looking at how the Environmental
22 Assessment Board should deal with questions can you say
23 to the people on your Board can you say to the public,
24 well, here's a way of doing it, we won't follow
25 fundamental justice; that's easier?

1 Dr. Connell, do you feel that this sort
2 of process in which you change the rules in midstream
3 and still make the decision, do you believe that that
4 is right?

5 I think that the answer has to be: It
6 clearly is not. Therefore, my submission is that you
7 should not only say to the government we don't accept
8 your invitation but tell them pretty clearly that it
9 wasn't a very good idea to even ask you.

10 Those are my submissions.

11 THE CHAIRMAN: Thank you, Mr. Shepherd.
12 Ms. Marlatt?

13 MS. MARLATT: Mr. Chairman, Members of
14 the Panel, my client's position in this hearing was
15 that Ontario Hydro's planning methods were
16 fundamentally flawed and were therefore inadequate
17 under the Environmental Assessment Act. We consider
18 this withdrawal in fact to be Ontario Hydro's agreement
19 with our position on that.

20 But now this leaves Ontario Hydro in a
21 position where they will continue to make decisions
22 without review under the Act until they get to project
23 hearings. This leaves hydraulic approvals still going
24 forward under the Environmental Assessment Act. How
25 will this evidence be used in those site hearings?

1 If you make a report under an advisory
2 committee's name could those findings be used to
3 support the requirement and rationale at a site
4 hearing?

5 If you look at the terms of reference
6 that were issued in this news release it would include
7 the advisory committee reporting on topics of
8 conservation, load forecast, non-utility generation,
9 existing facilities, method for incorporating
10 environment and social impacts in Ontario Hydro's
11 planning decisions. Those are a partial list of issues
12 that would be necessary to be looked at to establish
13 requirement and rationale for a project.

14 In other words, the requirement and
15 rationale of a project hearing could be gotten through
16 going through a back door. And if that occurs, it is
17 fundamentally unjust.

18 So our first concern here is that the
19 report of such an advisory committee could be used to
20 either bolster the requirement and rationale for
21 projects at a hearing or for the Minister to make a
22 decision to exempt requirement and rationale from
23 consideration at a project hearing.

24 Our second concern is much broader, and
25 that is, determining the appropriateness of Ontario

1 Hydro's planning which must be done in a comprehensive
2 way as it was intended to be done at this hearing. But
3 your advisory committee cannot do so.

4 Further, it is the advisory committee
5 which will set the terms of reference about funding if
6 any, about who appears if any, about cross-examination
7 if any. In other words, there is no protection for my
8 clients under the Environmental Assessment Act. There
9 is not intended to be.

10 So our concern is that a process by which
11 the advisory committee will come to a recommendation
12 will be limited. It has to be limited under these
13 rules, that the implications of such a recommendation
14 could be enormous, and they could be that Ontario
15 Hydro's planning methods are accepted without a proper
16 environmental assessment under the Act.

17 You are still an Environmental Assessment
18 Board here today, and I submit to you that your first
19 obligation is to protect the integrity and the purpose
20 of the Environmental Assessment Act, and if you
21 determine that an advisory committee is the way for you
22 to do so then I urge you to ensure that the purpose of
23 the Act is not lost, avoided or defeated. If you
24 don't, then my clients have no guarantee that the
25 hydraulic approvals will not end up as sacrificial

1 lambs of Ontario Hydro's failure to plan properly.

2 Thank you.

3 THE CHAIRMAN: Thank you, Ms. Marlatt.

4 Mr. Klippenstein?

5 MR. KLIPPENSTEIN: Thank you, Mr.

6 Chairman. I have six short points.

7 First of all, I would make the same
8 distinction made by Mr. Mark earlier. My submissions
9 assume a very clear division between the decision that
10 the Board makes with respect to termination of the
11 hearing on the one hand and any decision that the Board
12 makes with respect to continuation as an advisory panel
13 or in any further inquiry process.

14 With respect to the first point, it is my
15 respectful submission that this Board does not have the
16 jurisdiction to go beyond the termination of the
17 hearing and does not have the jurisdiction to
18 reconstitute itself as some kind of advisory committee.

19 My first substantive point is one you
20 have heard before. If the proposed process is followed
21 in my very respectful submission it would be unfair, it
22 would not be a level playing field, it would be hearing
23 one side of the story.

24 By definition, such a concern does not
25 reflect on the integrity or the skill or the wisdom of

1 the Members of this Panel. It reflects on a process
2 that the Members of this Panel would be subject to, and
3 so I hasten to add that caution. That is a concern
4 shared by many, and I won't go further into that.

5 Secondly, the suggested process would be
6 unprecedented to the best of my knowledge. It would be
7 turning a half-completed, quasi-judicial proceeding
8 into an advisory procedure. I know of no precedent,
9 and that sends warning flags up in my mind, and I
10 suspect there is some wisdom in there being no example
11 of this being chosen or done before.

12 Thirdly, and again with the greatest of
13 respect, there is an element of misleading the public
14 inherent in the proposed procedure. Any
15 recommendations from this advisory committee will be
16 seen by the public as something they are not; they will
17 be seen as bearing the imprint of quasi-judicial
18 legitimacy, and I suspect that is one of the purposes
19 the government has selected this proposed procedure.

20 I question in my mind why the government
21 has simply chosen not to appoint three members of the
22 public to read all the materials and provide advice,
23 and I think the answer is the government knows very
24 well that the impression that will be left from having
25 the continuation in some form of a quasi-judicial

1 proceeding will have an impact on the perceptions of
2 the public.

3 Fourthly, the purpose and scope of the
4 proposed procedure is extremely confused. I recognize
5 that there is an intention to clarify it. However, I
6 reviewed the Minister's letter submitted yesterday or
7 the day before, and I read what I conclude to be the
8 operative sentence:

9 The government believes it would be
10 useful to obtain your views and
11 recommendations on matters relating to
12 the importance to the province of an
13 environmentally sound, reliable and cost
14 effective electricity supply.

15 [3:30 p.m.]

16 I don't know what it means if the
17 government is requesting your opinion on whether an
18 environmentally sound, reliable and cost-effective
19 electricity supply is important to the province. The
20 inquiry need not be very long, I suspect. (Laughter)

21 The very confused nature of the request
22 is a matter of great concern.

23 If I turn to the news release, I see the
24 Minister saying:

25 We must get the best use of the

1 evidence presented to date.

2 I see also the phrase stated that:

3 The government has requested that the
4 three members of the hearing panel - and
5 the names are given - form an advisory
6 committee to assess evidence presented to
7 the hearing on supply and demand options.

8 Clearly there is some intention that this
9 be an assessment of evidence presented.

10 Presumably with respect to credibility,
11 with respect to weight, this is a very judicial
12 function. It is not a request, as far as I can see, to
13 comment on the procedures and give advice as to how it
14 could have been better done. This is a request to
15 evaluate evidence.

16 That evidence, in a sense, has been
17 discredited because the party relying on it, Hydro, has
18 withdrawn the whole purpose of presenting the evidence
19 in the first place. So I find the task requested of
20 you extremely confusing.

21 Finally, a word about the assessment of
22 the value of the hearing to date, and I concur with my
23 friends who have said that the value is high. It has
24 accomplished a tremendous service to the public of
25 Ontario. The process has succeeded. And I would

1 especially make a note, and I respectfully submit, that
2 the Members of this Panel, whether they provide any
3 further conclusions or suggestions or advice to the
4 government, have already performed a remarkable service
5 to the public this province, and they have done so by
6 using wisdom and fairness to govern the process of this
7 very difficult hearing over several years, and in a
8 sense that submission contains an element of thanks and
9 it also contains in my respectful suggestion that there
10 is no need to prevent further advice to the government
11 to have accomplished your service to the public of
12 Ontario.

13 Those are my submissions. Thank you.

14 THE CHAIRMAN: Is there anyone else in
15 Mr. Poch's group? Mr. Greenspoon and then Ms. Kleer.

16 MR. GREENSPOON: Mr. Chairman, on behalf
17 of my clients from Northwatch, we had faith in the
18 process and came here to stop the transmission
19 corridor, the hydraulic development and the nuclear
20 reactor on the North Channel, and we are not in
21 jeopardy as of today, assuming that you accept
22 somebody's submissions on what Section 7(3) means.
23 [Laughter.]

24 THE CHAIRMAN: It it doesn't matters
25 whose, I guess. [Laughter.]

1 MR. GREENSPOON: No. And if you accept
2 Mr. Heintzman's, maybe I will be back here on Tuesday
3 arguing the motion. I hope not.

4 But in any case, it was the process that
5 we reluctantly and skeptically, and with a lot of
6 trepidation, because we are so far away, and there are
7 things that haven't work and things that have work, but
8 we committed, submitted to the process. And it's like
9 I said this morning about trying to explain to my
10 clients now that, well, yes, Hydro doesn't want
11 anything, but the Board is going to reconstitute itself
12 as something else and make some decisions.

13 It's very difficult to maintain the
14 integrity of the environmental process. I can't be
15 near as eloquent as any of the people that have
16 preceded me as to why that is. It's tainted, and I am
17 surprised it's even being considered by all three of
18 you, given the wisdom that you have shown at these
19 hearings.

20 Actually, maybe we are presuming that you
21 are even considering it. Maybe you have already
22 decided not to. I would have assumed that that would
23 have been all three of your positions.

24 Those are my submissions.

25 DR. CONNELL: Maybe you are just

1 presuming that we are wise, Mr. Greenspoon.

2 [Laughter.]

3 THE CHAIRMAN: Ms. Kleer?

4 MS. KLEER: I always find it interesting
5 to follow Mr. Greenspoon.

6 I will be brief.

7 The first point I would like to make is
8 just a technical point. With respect to the letter
9 that was sent to you signed by Mr. Poch, of my clients,
10 only Grand Council Treaty #3 was added to the list.
11 That's not my because my other clients didn't want to
12 be added, but we had not been able to obtain
13 instructions from them. So I just want you to note
14 that point.

15 Secondly, I would like to emphasize the
16 point that has been made by my friend Ms. Marlatt, it's
17 also referred to in MDAB's letter to you about what
18 this report would be used for and the potential that it
19 would be used for some how dealing with the requirement
20 and rationale of hydroelectric. Not even just
21 requirement and rationale of hydroelectric, one could
22 also see it being used to justify other supply options,
23 and I think that's a real danger because the things
24 that are in the terms of reference now, let alone what
25 might be in it later, could very well be used,

1 especially with respect to forecasting I would submit,
2 that there are some very key issue in there that have
3 an effect on requirement and rationale.

4 The other concern that I have is that at
5 this point it is very unclear what this report would be
6 used for. We do not know. You do not know. And I
7 think it is unfair for people to participate in a
8 process that they have no idea what the purpose of
9 their participation is. I think that's a fundamental
10 principle of public participation is that one knows
11 what the purpose of the report is.

12 The other thing I am concerned about is
13 the fact that as I see the terms of reference
14 currently, they don't deal with some very key issues
15 with respect to my clients that you know and you have
16 heard many times are of concern to us, especially the
17 consideration of Aboriginal and treaty rights in the
18 energy planning process. That's a very key concern, it
19 seems not to have been included,

20 Another point I would make is that our
21 evidence has been crafted for an EA hearing and also in
22 respect to all of the rulings that this Board has put
23 forward.

24 With our hydroelectric evidence, for
25 instance, we have very closely paid attention to your

1 ruling with respect to exclusionary criteria and how
2 you will consider. That's how our evidence is put
3 together now. We don't see how in the course of the
4 time that you are expected to render a report, that
5 that evidence could possibly be turned around into
6 something that doesn't fit within an EA hearing and
7 suddenly becomes something else. It was very carefully
8 done that way because we knew we were dealing with this
9 hearing and we would be disadvantaged because that
10 evidence would in a lot of ways not be relevant any
11 more to your consideration, not in the way it is
12 currently formulated.

13 So I think that is a very serious concern
14 as to how you could deal with evidence that has already
15 been filed.

16 I don't want to say anything more. I
17 think we have been here all very long, but those are my
18 submission. If you have any questions.

19 THE CHAIRMAN: Is it there anything else
20 who is part of the CEG group?

21 Mr. Thompson, you are not part of that
22 group.

23 MR. THOMPSON: That's what I want to
24 speak to, Mr. Chairman.

25 Yes, Mr. Chairman, we are not on this one

1 page letter of Mr. Poch's. I spoke to Mr. Poch briefly
2 at the lunch break, and we would add the Ontario
3 Federation of Agriculture to that list.

4 Thank you.

5 THE CHAIRMAN: Thank you.

6 Mr. Colborne, are you also in support of
7 the CEG group?

8 MR. COLBORNE: Close enough.

9 THE CHAIRMAN: All right.

10 MR. COLBORNE: NAPA has a written
11 submission which is brief which has been provided to
12 the Registrar and it was developed independently of Mr.
13 Poch's submission, but it is in much shorter and less
14 thorough form very, very similar. So perhaps this is
15 the time for me to speak briefly.

16 NAPA does agree with Mr. Poch essentially
17 and disagrees with Mr. Mark.

18 The cliché I will adopt for today is that
19 life goes on. And I would refer to you the fact that
20 only perhaps I know about and that is that when nobody
21 else was here yesterday, with the exception of some
22 staff in the back, I came in for a moment and found
23 that the space here is being sized up by some other
24 agency. They are going to be moving in soon.

25 [Laughter.]

1 Life does go on. And that's why the
2 concepts that Mr. Mark was advancing seemed not to sit
3 exactly well me. The issues are still there, the
4 people are still there, the problems created by Ontario
5 Hydro's activities are are still there.

6 These people who all of counsel here are
7 trying to represent in the best way they can, they are
8 still out there, and I submit that a lot of them would
9 be quite dismayed, certainly some of my clients would
10 be quite dismayed and perhaps even more cynical than
11 they were coming into this process, to be told that the
12 same people who were going to sit here and listen to
13 their evidence now are not going to be, but will
14 nonetheless be making recommendations of a similar
15 character.

16 Now, in spite of that, returning to my
17 theme of life goes on, we see that this Board has
18 developed what may be unequalled expertise. My clients
19 as off-reserve Aboriginal people who as you have heard
20 me suggest from time to time in cross-examination, and
21 which appears in some of the written evidence filed,
22 have had all of the problems associated with being
23 members of Aboriginal communities but with none of the
24 support that is sometimes available to the on-reserve
25 Aboriginal communities. They are people who have

1 learned that you don't waste resources, and so we are
2 not about to denounce without reserve the notion that
3 the expertise that has developed here cannot be put to
4 use.

5 In that regard, I do not on behalf the
6 NAPA take a strong position about what you may decide
7 to do with some of the other counsel. I suggest that
8 perhaps you might want to attend to some of the serious
9 issues such as the one just mentioned by Ms. Kleer, for
10 instance, and attach that as private conditions in your
11 discussions with Ontario about what the future of this
12 process may be or the new process may be.

13 It may be quite appropriate for to you
14 say that ironically the very first major tribunal
15 hearing in Ontario which was geared to hear evidence
16 and to hear thorough argument where the parties were
17 properly funded on what the nature of Section 35 treaty
18 and Aboriginal rights are, how they apply to resources,
19 how they apply to the land in Ontario, very ironic that
20 the first time when that was ready to go it's not going
21 to go. That might be something that ought to be
22 pointed out to Ontario by yourselves.

23 Similarly, you have heard a number of us
24 counsel representing Aboriginal clients advise you of
25 the importance of Elder's knowledge, and that we were

1 proposing to call some of that evidence. I would
2 remind you that one of the unique aspects of that type
3 of evidence is that it is essentially oral. It cannot
4 be reflected very well or presented very well in
5 writing. So no matter how carefully one might review
6 filings that have now been made on behalf of the
7 Aboriginal parties, this Environmental Assessment Board
8 will never hear that essentially oral evidence.

9 Again perhaps just an irony. I am not
10 suggesting it is the cause of what brings us here
11 today, but nevertheless it might be the type of subject
12 that this Board ought to take up with Ontario in
13 deciding whether the process will continue in some new
14 form.

15 Just two other very brief points that I
16 don't think any one has mentioned.

17 There are outstanding undertakings of
18 Ontario Hydro. I suggest that it is still within the
19 scope of this Board's authority to rule, probably no
20 later than today or very shortly thereafter, that
21 Ontario Hydro ought to deliver those undertakings or
22 undertakings defined in a certain way, that it did
23 undertake to provide.

24 The one final point which I don't believe
25 was mentioned by anybody, is that in a new smaller

1 process issues that might only be identified by
2 specialized or smaller parties may not come to your
3 attention. And I will give you the one example of one
4 that NAPA would have not let you forget, I assure you,
5 and that is the fact that small hydraulic NUGs are not
6 environmentally assessed at the present time, which
7 lead to many, many problems for my clients. We would
8 have been stressing that difficulty. We would have
9 been arguing at the conclusion that there was
10 jurisdiction to address that, but we may well have been
11 the only party raising that. And there may well be
12 other smaller parties here today who have issues that
13 will simply in a smaller and more truncated process get
14 lost in the shuffle, and that we consider is
15 unfortunate, and you might be attentive to that problem
16 in any discussions that you have with Ontario about the
17 future of the process.

18 Thank you.

19 THE CHAIRMAN: Thank you, Mr. Colborne.

20 Is there anyone else who wants to speak
21 against the proposal?

22 Mr. Taylor?

23 MR. TAYLOR: Thank you, Mr. Chairman. I
24 will try to make my remarks as brief as possible.

25 We were not one of the signatories nor of

1 the the groups that were represented in Mr. Poch's
2 letter. We weren't aware of that letter. In fact, as
3 you are aware, we have filed with the Board our own
4 independent letter.

5 As I have been listening, and I had
6 prepared submissions to make, I find myself in
7 agreement with what Mr. Poch has said. He starts with
8 a chronology and then he goes to the Northwatch motion.
9 Mr. Chairman, in my remarks I was going to start with
10 the chronology, but mine was going to go back a little
11 further to the Moosonee Development Area Board Motion
12 in 1991 in which we asked that this hearing be
13 terminated then, and although it was denied at that
14 time, I submit it was the forerunner of a number of
15 motions and a number of rulings that have ultimately
16 led us to where we are now.

17 Secondly, I hear the remarks of Mr.
18 Shepherd, of Ms. Marlatt, of Mr. Klippenstein in terms
19 of there is no precedent ever for what is being
20 suggested to you today.

21 In effect, without going through the
22 balance of my notes that I have in front of me, I can
23 say that we adopt the positions that have been put
24 before, and urge you to reject out of hand the
25 suggestion that has been made to you.

1 I would be happy to answer any questions.

2 THE CHAIRMAN: Thank you.

3 Anyone else who wishes to speak against
4 the process.

5 Mrs. Mackesy and then Mrs. Smith. Mrs.
6 Mackesy first.

7 MRS. MACKESY: Mr. Chairman, only two
8 days have passed since Tuesday, so what I am about to
9 say are hurried and perhaps not very well set out
10 reflections on Ontario Hydro's withdrawal of the SDP
11 application and on the government's suggested follow up
12 process.

13 As can be seen from my November 12
14 response to the Northwatch motion for early dismissal,
15 I had concerns about what process would be set up to
16 take the place of the DSP. The opinions expressed in
17 response still stand today.

18 Would it be necessary for me to read that
19 into the record, or can I take that--

20 THE CHAIRMAN: No.

21 MRS. MACKESY: --as available to you.
22 Thank you.

23 So this afternoon I would like to speak
24 to three matters related to Tuesday's announcement.

25 First, to the request of Ontario Hydro

1 carrying forward the individual EAs; second, to the
2 government's suggested follow up process, and third, to
3 the state of the evidence filed with the hearing.

4 First with respect to the requests of
5 Ontario Hydro is carrying forward in the individual
6 EAs, I also wonder how requirement and rationale are to
7 be established for these projects now that the request
8 for DSP approval has been withdrawn. I am concerned
9 that the way they are treated might be used as a
10 precedent for the way later projects would be treated.

11 Second, with regard to the government's
12 suggested follow up process provide the present
13 Environmental Assessment Board DSP hearing panel would
14 be changed into a government advisory committee. I
15 don't know what to make of the suggestion and certainly
16 I am dubious about it for a number of reasons.

17 (A) it is difficult to comment on a
18 suggestion when you don't know what the ramifications
19 are. For instance: (1) does somebody somewhere inside
20 or outside the government have a plan for which the
21 government would like endorsement of certain aspects by
22 the reconstituted advisory committee; (2) would
23 endorsement of certain measures by the committee be
24 later interpreted as establishing need and rationale
25 for the building of any future facilities such as

1 transmission lines whether described as radial or
2 inter-area, thus denying people having to host or live
3 next to these facilities requirement and rationale
4 hearings where they could put forward other solutions
5 for acceptance. I am thinking here not of the
6 hydraulic approvals, but of any transmission or
7 generation projects Ontario Hydro would bring on in the
8 future; (3) what is the relationship of the February
9 1990 hearing notice map to decisions made by the
10 advisory panel?

11 As the Board is aware, I have very grave
12 concerns with that notice as laid out in the response I
13 made to the Panel 7 motion.

14 [3:55 p.m.]

15 And (4), how will the advisory committee
16 handle ongoing developments?

17 A second reason for being concerned about
18 the suggestion is that this seems to be another very
19 rushed process where people are pushed into making
20 hurried decisions about important matters such as the
21 suggestions to the Board on what it should stipulate to
22 the government regarding the advisory committee, and
23 where participation will be restricted by the use of
24 the August deadline, perhaps forcing people either out
25 of the process or into alliances where they may end up

1 being misrepresented.

2 Third: I am concerned because of the
3 precedent this could set for future environmental
4 assessment hearings. I am opposed to changing the
5 present hearing panel into an advisory committee
6 because perhaps Ontario Hydro would use that tactic in
7 later environmental assessments to its own benefit and
8 to the disadvantage of people having to host
9 facilities.

10 Fourth: The advisory committee concept
11 seems different from the DSP, and I wonder whether the
12 new process would require new public notification and
13 the presentation of additional evidence on whatever are
14 the topics of the new review by both present status
15 holders and new status holders.

16 And fifth: I wonder whether the
17 transcripts of the proceedings would be -- could be
18 followed by people later.

19 The third matter I want to address is the
20 evidence currently filed at this hearing. I feel there
21 are some limitations that reduce its value.

22 First, only part of the evidence for this
23 hearing has been fully presented, and most of that
24 comes from Ontario Hydro, so that the advisory
25 committee would be reporting on a partial presentation

1 of evidence, to my mind.

2 Second, the material put before the Board
3 has been restricted by how Ontario Hydro has set out
4 its request for approvals in the DSP so that the
5 evidence before the advisory committee, while
6 extensive, is incomplete. For example, notice,
7 decisions and distinctions about alternatives have
8 limited the evidence.

9 Third, because cross-examination was not
10 supposed to become argumentative in some situations
11 only a one-sided view is on the record, unbalanced by
12 opposing evidence and/or argument, and I wonder whether
13 parties will still be able to make arguments to the
14 advisory committee.

15 Fourth, in my own situation I have not
16 yet filed as complete a presentation as I intended when
17 I filed my preliminary presentation on September 21,
18 1992, to which I have added a short typographical
19 correction sheet on December 21st, 1992.

20 In anticipation of a fuller presentation
21 in September, the preliminary version has not been
22 assigned an exhibit number, so there is nothing in the
23 way of a presentation from myself before the Board.

24 The presentation from Mr. Cullen, our
25 participant, forms the first part of the fuller

1 presentation, and so that of course is also not before
2 the Board. I would be requesting permission to
3 complete that presentation and file it in a short
4 period of time.

5 In closing, I would like to reiterate
6 that Mr. Cullen and myself disagree with the changing
7 of this DSP Hearing Panel into an advisory committee.

8 Our position on electricity planning has
9 not changed over the course of the hearing. We are
10 still of the opinion, as we say in the conclusion of
11 the September 21st preliminary presentation, that:

12 The 25-year DSP plan was an
13 opportunity for Ontario Hydro to bring in
14 a system stimulating electricity-user
15 responsibility for the environment.

16 Ontario Hydro could have done this by
17 putting forward a plan for filling
18 electricity demands through building new
19 local generation. Instead, they chose to
20 look forward and expand the bulk
21 electrical transmission system.

22 Generation plants built outside the areas
23 of use and transmission lines built
24 cross-country to move electricity from
25 those plants to areas of use represent

1 the failure of society to take
2 responsibility for its electricity use.

3 This opinion applies not only to Ontario Hydro's
4 projects but also to alternatives, also to alterations
5 of its present facilities, to NUG development, and to
6 demand management development.

7 Any comment we would make on terms of
8 reference for such an advisory committee, would be set
9 in the context of those opinions.

10 Before I close I probably should also add
11 that we are rather dubious about the proposed
12 regulatory review process that some people have
13 suggested.

14 Thank you very much.

15 THE CHAIRMAN: Mrs. Smith?

16 MRS. SMITH: Mr. Chairman and Panel, good
17 afternoon.

18 As I understand your request, you are
19 looking for submissions on two items. The first one I
20 didn't get a chance to speak on this morning. I only
21 have a brief statement on that, and that is, does
22 subsection 7(3) of the Environmental Assessment Act
23 apply in these circumstances?

24 Number 2 would be: If it does, what
25 terms and conditions of Ontario Hydro's withdrawal of

1 its DSP application are appropriate?

2 As I see it, number 1 is a point of law,
3 and not being a lawyer I really can't tell you if it is
4 right or wrong, but I do feel that it would have been
5 better for all concerned if Ontario Hydro had decided
6 to withdraw earlier when they were being urged to do
7 so.

8 Also, I feel that some mechanism must be
9 put in place to prevent this situation from happening
10 again. Two years and \$55-plus million, I don't feel
11 the people of Ontario can afford it.

12 I also feel that I spoke with Ruth Grier
13 in early November and asked her about stopping these
14 hearings. She told me at that time that that was her
15 plan and that she was trying to figure out some way to
16 be able to use the evidence that had been presented to
17 this Panel so far without wasting all the time and
18 money.

19 I feel based on that, that Ontario Hydro
20 misled this Panel and intervenors when it asked for an
21 adjournment in November. I feel that this adjournment
22 and the presentation of changed evidence was a way for
23 them to get this changed evidence before this Panel
24 before the environmental assessment process was
25 terminated so that this evidence would have to be

1 considered by you people if you became an advisory
2 panel.

3 I would like now to comment on number
4 two. Number two, on the other hand, is somebody
5 something that I feel I would like to comment on.

6 THE CHAIRMAN: You must go slower. The
7 reporter is having a little difficulty taking down what
8 you are saying because you are going too fast.

9 MRS. SMITH: I'm sorry. I will start
10 again.

11 Number two, on the other hand, is
12 something I would like to comment on.

13 If this new advisory panel is going to be
14 deciding whether or not Ontario Hydro's planning
15 process is a good process, then I think that answer has
16 been established. They would not be in this mess if it
17 were a good process, and their withdrawal should be
18 immediate and not involve any further expense and time.

19 But if the new advisory panel is going to
20 be designing a new process providing the province with
21 an environmentally sound, reliable and cost effective
22 electricity supply that does not see Ontario Hydro as
23 the exclusive planner of Ontario's electricity supply
24 and demand, then I have some concerns I would like to
25 address.

1 If Ontario Hydro withdraws its proposal,
2 will I still have the opportunity to go to another
3 environmental assessment hearing, at which time Ontario
4 Hydro would have to enter into a full environmental
5 assessment with no recommendations that had been made
6 by this advisory panel limiting my intervention in that
7 environmental assessment and with no predetermined need
8 and rationale having been established by that Panel?

9 I would also now like to refer to a
10 letter that has been submitted by O'Connor & Cloud. I
11 would like to refer to number 6 in that, and I would
12 like to refer to the part where it says: Ontario Hydro
13 using the back door to obtain what it could not obtain
14 through the front door. This is a real concern of mine
15 and if this is true, then this suggests to me another
16 flawed process at Ontario Hydro.

17 I think the issues -- I think this issue
18 is too clouded at this time for me to really be sure
19 what would happen. I don't think -- would it not be
20 premature for us at this time to be asked to make these
21 decisions when we don't really know the answers to
22 certain questions? I would like to pose them.

23 Number one. What authority will this new
24 advisory panel have?

25 Number two. What will be done with the

1 report that will be generated and what weight will this
2 report carry?

3 Number 3. How will it affect the
4 Environmental Assessment Act in future? I am concerned
5 that this will abuse the environmental assessment
6 process. Certainly, I feel that it will limit the
7 scope of it.

8 Number 4. Is it the intention of the
9 Minister that you, as an advisory panel, will go into
10 Ontario Hydro and, based on your expertise gained here,
11 show them the error of their ways? I would like to
12 know who would make these decisions and when these
13 decisions would be made?

14 I would like now to turn to the news
15 release that was released. I have some real concerns
16 about this news release. There are some facts in here
17 that scare me.

18 One, the environmental assessment process
19 must be responsive when there is a change in a
20 situation, Mrs. Grier said. With Ontario Hydro now
21 forecasting electricity surpluses in the years ahead,
22 we must get the best use out of the evidence presented
23 to date.

24 Mr. Charlton responds with: A wealth of
25 information on social and economic and environmental

1 implications of electricity generation and conservation
2 was generated by the hearing. This information should
3 be incorporated into the many difficult decisions
4 Ontario Hydro faces this year, he said.

5 Is this what the new panel will be
6 ordered to do? I would like an answer to that question
7 if it is possible, please.

8 Do you mind if I just get a drink?

9 I have concerns that this Panel, no
10 matter how unintentionally has to date been strongly
11 exposed to Ontario Hydro's evidence, and therefore, the
12 task of separating their evidence as opposed to other
13 intervenors' evidence and weighing it, would be
14 something more than humanly possible unless equal time
15 and effort is put into the presentation of such
16 intervenor evidence.

17 All evidence presented by intervenors
18 will not be presented in an actual presentation format
19 for other intervenors to see it and to see it be
20 presented and to weigh it. I see this as a new process
21 limiting the intervention of Ontario Hydro's opposers,
22 the public and all intervenors.

23 I feel that it would limit this
24 proceeding, because there would be no meeting room,
25 facilities, fax, phone, photocopy, et cetera, or

1 funding. I see this new process as a mini-process to
2 deter Ontario Hydro's opponents.

3 If this process goes forward -- and I'm
4 not sure how this will affect me because I just
5 received notice today. I'm here because of the STR
6 project. I just received notice today that there have
7 been some changes to that project, and I haven't been
8 able to find out exactly what they are.

9 But if you do decide to go to this new
10 advisory panel, I would like to say that I support the
11 letter from David Poch. I didn't know about the letter
12 before; I just saw it today, had no chance to speak
13 with him. I also support the concerns of Ms. Marlatt.
14 She seems to have concerns that are similar to mine.

15 I would also ask that the Panel must
16 remember that only Ontario Hydro's evidence has been
17 presented. It would be wrong to use this evidence
18 alone to plan Ontario's energy future because other
19 interest groups have alternatives which are superior.

20 Whatever is the future of this Panel or
21 of the planning process, these points of view and
22 alternatives which are now missing from the body of
23 evidence, have to be included.

24 Number two, the group I represent wants
25 to be included, and I'm sure other groups will want to

1 be, and further, our ideas should be received and
2 considered.

3 Number 3, I think that public
4 consultation with proper notification is a must.

5 It is my feeling that these hearings
6 should be terminated and that there shouldn't be an
7 advisory panel to decide on these issues, but if it is,
8 you know, this is the way I feel about it.

9 Thank you.

10 THE CHAIRMAN: Thank you, Mrs. Smith.

11 Does that complete the people who wish to
12 speak against the proposal?

13 Mr. Moran, do you intend to make
14 submissions? Ms. Couban?

15 MS. COUBAN: I have a few things to say.

16 THE CHAIRMAN: Yes. Who else would like
17 to make submissions? And Mr. Heintzman. All right.

18 I think we should take a break. We have
19 been here for nearly two hours, and we will take a
20 15-minute break, but we will try and finish this today.

21 THE REGISTRAR: Please come to order.
22 This hearing will take a 15-minute break.

23 ---Recess at 4:10 p.m.

24 ---On resuming at 4:30 p.m.

25 THE REGISTRAR: Please come to order.

1 This hearing is again in session. Please be seated.

2 THE CHAIRMAN: Ms. Couban?

3 MS. COUBAN: Thank you, Mr. Chairman,
4 Members of the Panel.

5 I can advise you that my clients are
6 aware of Mr. Poch's letter, and my instructions remain
7 the same today as they were when Minister Grier wrote
8 to this Panel inviting them to become an advisory
9 committee.

10 The invitation to you to sit as an
11 advisory committee remains open on the terms of
12 reference set out along the lines in that letter from
13 Madam Minister Grier but to be finalized between the
14 government and the Board.

15 I would like to emphasize that the
16 process contemplated is a new process. It is not a
17 continuation of the environmental DSP process. The
18 environmental assessment process is over. The new
19 process is not a decision-making process, but rather,
20 it is a request by the government for the advice, views
21 and recommendations of the advisory committee. The
22 government's view remains that there is considerable
23 public benefit and public value to be gained from
24 having the views, advice and recommendations of such a
25 committee.

1 I would like to address the concerns
2 raised firstly by Ms. Marlatt and then concurred in by
3 Ms. Kleer and Mr. Colborne with respect to their
4 concern that a committee report or a report from an
5 advisory committee could be used to bolster a
6 site-specific requirement and rationale.

7 We believe that Ontario Hydro as a public
8 sector proponent subject to the Environmental
9 Assessment Act recognizes its obligations under the
10 Environmental Assessment Act, and it is our
11 understanding - and perhaps Ontario Hydro can speak to
12 this later on - but our understanding is that Ontario
13 Hydro will be reviewing their project-specific
14 environmental assessments so as to bring them into full
15 compliance with the Environmental Assessment Act so
16 that they can stand alone as complete environmental
17 assessments.

18 I would hope that Ms. Marlatt, Ms. Kleer
19 and Mr. Colborne could have some comfort in that.

20 The government for its part at least is
21 confident that this Panel, if it chooses to accept the
22 government's invitation to sit as an advisory
23 committee, will preside over the new process however it
24 is ultimately finalized in the impeccably fair and
25 even-handed manner that you have since the beginning of

1 this process two or so years ago.

2 The government has every confidence that
3 if you accept the government's invitation that you will
4 fairly take into account the views of those parties,
5 individuals, organizations and groups that you must
6 contact in order to provide fair, balanced and helpful
7 advice to the government.

8 Those are my submissions. Thank you, Mr.
9 Chairman, Members of the Panel.

10 THE CHAIRMAN: Thank you, Ms. Couban.
11 Mr. Mattson?

12 MR. MATTSON: Thank you, Mr. Chairman.

13 I think giving these submissions now
14 basically means that Energy Probe has been against
15 every party at this hearing and with every party on
16 some issue at some point in this hearing, and now we
17 find ourselves in agreement with AECL and AMPCO and
18 some others whom we haven't been in agreement with yet
19 at this hearing, but I suppose it's good company.

20 Mr. Chairman -- and don't let that scare
21 you away from our position.

22 Mr. Chairman, Energy Probe recognizes the
23 concerns of the others with respect to the advisory
24 panel that the government has proposed, and at this
25 time my client feels that the panel itself hasn't been

1 constituted and you haven't accepted to take on that
2 role, you haven't discussed it with government yet, you
3 haven't set out the parameters of what it is you in
4 fact intend to do.

5 And I would hope that if you do choose to
6 proceed, and I think that that is a personal decision
7 on your part, but if you do choose to proceed, that you
8 will take into account the concerns that you have heard
9 from my friends and that you would explicitly try to
10 deal with many of them up front.

11 In fact, you could, for example, be quite
12 explicit that this process will not be seen as a
13 replacement for the Demand/Supply Plan, you will not be
14 making decisions that you were empowered to make under
15 the Environmental Assessment Act, and that it is not a
16 replacement for any planning hearing with respect to
17 hydraulic approvals that Hydro may seek. I think that
18 that can be done up front and before the process is
19 under way.

20 Energy Probe's position at this time, Mr.
21 Chairman, is that as a public interest group, Energy
22 Probe always looks for different forums to discuss
23 energy matters. Energy Probe has not turned down any
24 opportunity in the last 15 years to discuss energy
25 matters in the province, and Energy Probe feels that to

1 do so now would not be something that they could do in
2 all seriousness because, in fact, Energy Probe would
3 love to sit down and discuss these issues further.
4 Energy Probe would love to take advantage of it.

5 However, there are a couple of concerns
6 that Energy Probe would like to make you aware of, and
7 that is, first of all, Energy Probe is hopeful that it
8 is an effective opportunity for parties to participate
9 and it is a public forum, it is an open hearing process
10 and it is accessible to the public.

11 As was the case with the Demand/Supply
12 Plan, Energy Probe not only had the intention of
13 getting evidence before you, but also was using the
14 Demand/Supply Plan as an opportunity to communicate
15 with the public, with the press, and with politicians
16 with issues that were of concern to Energy Probe.

17 Energy Probe is not a lobby group with
18 close ties politically, it is not a vested interest,
19 and, in fact, it depends on the "public process" to
20 gets its ideas and its concerns across.

21 [4:35 p.m.]

22 Energy Probe's other concern is that the
23 Board is assured that at the end of the day the
24 decisions of the Board will be taken seriously by
25 Ontario Hydro and that the decisions will form the

1 basis for future decisions whether it be by government
2 or by other parties. And I guess that concern is
3 linked to the time constraints that the Minister has
4 suggested.

5 I think that there are two different
6 constraints on you, Mr. Chairman. I think first of
7 all, there is the time constraint that it is too
8 small -- it's too short, and for you to go through all
9 the evidence that's been filed by the intervenors,
10 which to date has not been put in, what has been filed
11 as evidence but has not been testified to is a great
12 task before you.

13 On the other hand, Ontario Hydro is
14 making decisions very rapidly at this time, and
15 obviously any decision that you make will have to be
16 made in a fairly short time frame if it's to influence
17 any decisions, long-term decisions that we have been
18 told in the press, at any rate, that Ontario Hydro will
19 be making.

20 So as a public interest group with
21 scarcity of resources, human resources and financial
22 resources, and Energy Probe has many other hearings
23 that it participates in, it's got the Nuclear Liability
24 Act cases, Hydro rate hearings, certainly we would look
25 for an indication that any efforts and resources that

1 are put into that process, the advisory panel, are not
2 irrelevant, will not go unheeded, and in fact will form
3 the basis of some important public document that will
4 be used and will be seen as influential by Ontario
5 Hydro and others.

6 And finally, Mr. Chairman, I think that I
7 would just like to reiterate Energy Probe's view is
8 that this a decision that's your. It's a personal
9 decision whether or not you accept the offer to
10 continue on in the advisory panel. You have spent a
11 great deal of time and there has been great commitment
12 on your part to the process, and you may not chose to
13 accept this role. However, if you do, and if it is an
14 effective process, Energy Probe will at that time look
15 at the parameters of the advisory panel and would like
16 the opportunity to participate.

17 Thank you.

18 THE CHAIRMAN: Mr. Campbell.

19 MR. M. CAMPBELL: Thank you, Mr.
20 Chairman.

21 I represent a party with a single
22 interest, the public health interest, and so it is
23 easier for us to face the uncertainty of the advisory
24 committee process. We can adjust our case a little
25 more readily than some of the others, I believe.

1 In any event, the Public Health Coalition
2 fully supports the government initiative and invites
3 you to take up the challenge of becoming an advisory
4 committee in this area.

5 I thought I would touch on the several
6 reasons why we take that position and then touch on
7 three issues: legal authority, process, and some of
8 the dangers which other parties have touched on.

9 The first reason why the Public Health
10 Coalition supports the government's initiative is that
11 the public health issue is being canvassed for
12 virtually the first time in hearings of this sort in a
13 great level of detail with a great level of support,
14 and the primary consideration of the Public Health
15 Coalition is that the issue of public health not be
16 removed from the agenda of public debate.

17 Secondly, a lot of work and effort has
18 gone into the assessment of health effects, work which
19 in our view should be retained and not lost. I don't
20 believe it is sufficient to file material of this sort.
21 I think it should be subject to some scrutiny. I will
22 speak of the process later.

23 Apart from those reasons I think there
24 are two deeper reasons which have suggested themselves
25 to my client. The economic circumstances which have

1 basically apart from the Northwatch motion forced Hydro
2 to reconsider its basic planning assumptions and so on
3 gives the government, Hydro, the public a golden
4 opportunity in two particular ways.

5 It will give the government, this Board,
6 and so on time to expand or review or contemplate a
7 comprehensive energy policy for the province as a
8 whole, in which electricity would be only a part. In
9 other words, we have a breathing space where some of
10 the assumptions can be revisited, and it seems to me
11 that the work of this advisory committee could be a
12 very important part of that assessment, appraisal or
13 discussion.

14 Secondly, with the moratorium on new
15 construction announced by Hydro it would enable Hydro
16 together with perhaps government and others to develop
17 a more complete monitoring of emissions and health
18 effects of its existing nuclear and fossil plants.

19 It struck me during of the time of my
20 several cross-examinations of experts that there were
21 many gaps in the monitoring and an absence of health
22 effects data on which to base planning. A hiatus in
23 this proceeding would allow the advisory committee to
24 perhaps make recommendations to government and Hydro in
25 those areas, so that in the fullness of time there will

1 be much better information.

2 So for those reasons the Public Health
3 Coalition supports the notion of an ongoing process and
4 a revised process which would enable the public to be
5 better served.

6 I thought I would speak about the three
7 issues. The first is the legal authority of the
8 advisory committee. It seems to me that the
9 government, the Minister has authority under Section
10 32, the Environmental Assessment Act, to appoint an
11 advisory committee. It does not appear that the
12 statute enables the Minister to clothe the committee
13 with any power. I don't view that as fatal.

14 The Board in its capacity has developed,
15 I would say, a great deal of moral power. They would
16 be calling people with a stake in the issue before it.
17 There would be ongoing commitments to professionalism,
18 standards of excellence, honesty, and so on, which I
19 think would stand the Board and the parties in good
20 stead.

21 If that fails you have the power of the
22 purse, which is not an significant power, and the power
23 to retain experts and to give expertise. Expert advise
24 I think is not something which should be ignored.

25 The issue raised about Section 18 and the

1 public service component I don't believe is germane
2 here because I do not believe that one becomes a civil
3 servant by accepting an appointment to an advisory
4 committee. So I don't think that is a bar.

5 On the issue of process, it is perhaps
6 easier for me with a single interest to contemplate a
7 process which is likely to get a better result. I have
8 been concerned personally with the inadequacy - and I
9 say this with all deference to my friends - of the
10 adversarial process where we have a report filed,
11 interrogatories, direct examination, cross-examination.
12 More often than not the thrust of the cross-examination
13 is to discredit rather than to illucidate. The
14 responses tend to be, shall we say, less than full
15 there, perhaps based on a different agendas.

16 And I say this with full knowledge that
17 this process tried and true in an adversarial sense is
18 perfectly fair and valuable in certain types of
19 contexts, but in the public policy context you do not
20 have simple answers to complex questions in the same
21 way you way see in say an ordinary courtroom where the
22 issue is whether a car hit another car or went through
23 a red light.

24 So it seems to me that the collegial
25 approach, a panel of equals sitting around a table with

1 facilitors and so on would be a better way of getting
2 results in a policy setting. And this is not just a
3 bright idea, if you consider most major political
4 parties, most governments operate in much the same way.
5 Policy is discussed not with someone from legal branch
6 cross-examining a deputy, but rather in a collegial
7 setting discussions around a table.

8 I remind my friends that fairness, which
9 has been stated here, can take many different garbs,
10 and, in essence, fairness is the opportunity to be
11 heard. And it seems to me that there are many ways to
12 be heard apart from cross-examination.

13 Certainly in the submissions which we
14 have made and the exhibits filed in this case we have
15 drawn the attention of the Board to the inadequacy of
16 the process as we see it and made the recommendation
17 that there be other ways of approaching these difficult
18 issues.

19 Also on the issue of process, it seems to
20 me that it would be relatively expeditious and I am
21 mindful of the time constraints for the Board to
22 identify parties having particular interests in
23 particular areas of concern, for example, health, to
24 arrange for the circulation of the reports, and rather
25 than the exchange of interrogatories, perhaps inviting

1 the exchange of reviews by other experts.

2 In the preparation of our experts' report
3 we submitted a number of them to external reviewers for
4 comment and, quite frankly, I found those comments of
5 far greater value than any interrogatory session that
6 one might put.

7 I would think it would be relatively
8 convenient or simple to arrange for an exchange of
9 these views in that fashion, possibly identifying areas
10 of common concern and agreement and identifying areas
11 of disagreement and putting those before the Board in
12 an informal setting in a relatively expeditious way.

13 I regret that I see a very limited role
14 for lawyers in this exercise. I think that the result
15 would be that the experts would find they can get along
16 very well without a lot of legal interpretation. But I
17 think that's part and parcel of the public process.

18 The last point I would like to discuss
19 are two or three areas of danger or concern.

20 One of the significant difficulties in a
21 attempting to form a collegial approach to matters of
22 great contentiousness is that there may be parties with
23 whom no reasonable compromise can be reached. In
24 effect, we found this out in November and December of
25 the past year wherein we considered alternative dispute

1 resolution. And if there is a party or a group of
2 parties who will not compromise or discuss the issues
3 in an intelligent and open way, the collegial process
4 can be, in a sense, Shanghaied. Wealthier parties may
5 have an enormous advantage by swamping a session with
6 experts, photocopy machines, you can imagine the sorts
7 of things that might happen.

8 It seems to me that the Board could
9 reasonably guard against that by its own participation
10 in certain key hearings, and also in reliance on the
11 professionalism of experts and ultimately the scrutiny
12 of other parties. It seems to me that we would be
13 happy in our Coalition to advise our party, our experts
14 to participate fully and to try to co-operate wherever
15 possible in reaching viable conclusions.

16 The second area of concern which I have
17 is that we have heard many arguments to date from
18 people who are opposed to the notion that the advisory
19 commit can be constituted properly. It seems to me
20 that without strong support from a broad spectrum of
21 stakeholders, the whole process may lack credibility or
22 at least be seen to lack credibility.

23 It seems to me that that could be
24 remedied by inviting experts from the various
25 organizations to participate. You might wish to make

1 it as easy as possible for those people or have
2 expressed concerns today to participate in the future.

3 That's about the only way that I can see
4 around that problem. I am concerned that quite a
5 number of people have expressed concerns about the
6 process.

7 Those are my submissions, sir, other than
8 questions.

9 THE CHAIRMAN: Thank you, Mr. Campbell.

10 Mr. Rodger.

11 MR. RODGER: Thank you, Mr. Chairman.

12 Others who have preceded me have
13 discussed the distinction between submissions
14 respecting this morning's comments Mr. Heintzman's and
15 those of the afternoon. I will be dealing strictly
16 with the separate and distinct issue which the
17 government has requested that this Board's undertake.

18 AMPCO very much regrets Ontario Hydro's
19 decision to withdraw its plan earlier this week. In
20 its view -- and I would add that the Board should
21 remember that the broad planning issues that ended up
22 in this process really began in 1984 when there was
23 select committees, various consultations and proceeded
24 to the DSP that was announced in 1989. And that a
25 fundamental purpose of the DSP proceedings, and it was

1 a purpose that Hydro witnesses in Panel 11 confirmed,
2 was to avoid repetition and duplication of planning
3 issues in subsequent proceedings, and it looks like
4 that's not going to happen now unless this idea of an
5 advisory commit takes some hold.

6 The important point for AMPCO that others
7 are forgetting, I would submit, is that while the DSP
8 is gone, the important planning issues remain, and
9 those planning issues of the short-term and in the
10 long-term. And in fact, many of those issues have
11 become even more important that we get some kind of
12 recommendation or decision on, given the many, many
13 uncertainties that we have heard about over the past
14 two years and new uncertainties that have arisen in the
15 past few weeks; for example, the fate of Bruce "A".

16 So while the open public forum which the
17 DSP represented is now being denied to interested
18 stakeholders, we are now faced with the only prospect
19 that remains, and that is this advisory committee.

20 And while AMPCO's first preference would
21 be to carry on with the current proceedings, these
22 issues are very, very important to us and we would
23 suggest that, in attempting to try and achieve some of
24 these goals of getting decisions and getting
25 recommendations on Hydro's planning, that we would be

1 prepared to participate in a forum as the government
2 has suggested, but with a couple of conditions.

3 And briefly speaking, those conditions
4 are: That the advisory committee would be premised on
5 the principle that it would be free to consider,
6 determine and recommend which planning methodologies
7 are the appropriate ones for Ontario Hydro, and that
8 the committee has the unrestricted discretion to
9 consider and report on the following matters and
10 specifically answering the question of what is the
11 preferable principle which adequately protects
12 ratepayers long-term interests, that being planning to
13 the upper or planning around the median, and also what
14 would be the preferred response portfolio which Ontario
15 Hydro could rely upon in the event of uncertainties in
16 load growth or demand management penetration rates, or
17 the closing of Bruce "A" or various other results that
18 could affect demand in this province.

19 We also believe that at some point or to
20 some degree in this committee process that the issue of
21 regulatory reform should be discussed.

22 We appreciate that the time lines are
23 very short for the Board to make recommendations,
24 however you will recall in the fall of the year AMPCO
25 was prepared to discuss alternate dispute resolutions

1 and that we were willing to talk about regulatory
2 reform at that time, that still remains a very key
3 issue and with the results of the past week and Hydro's
4 withdrawal this has come to the forefront.

5 In terms of the process for the
6 Committee, I think Mr. Heintzman's submissions this
7 morning that the federal EA process could be a model is
8 appropriate and has some merit. AMPCO would view the
9 committee as having as a key function reviewing the
10 filed evidence of the intervenors to date, and leaving
11 the process under the Board's control, the Board or the
12 committee would identify the issues which it thinks are
13 appropriate which responds to the government's request,
14 they would single out the issues, single out the
15 reports. If there was cross-examination that had to be
16 done, then the Board would either initiate that or
17 perhaps appoint one lawyer to represent all like-minded
18 parties to carry out that and achieve it within the
19 time frame that's presented to it.

20 I think if the Board did agree to accept
21 this committee these issues could then be discussed in
22 greater detail, but for a first premise, the federal EA
23 process might be an appropriate starting place.

24 At the end of the day, Mr. Chairman, and
25 to respond to an earlier submission against this

1 proposal, if the lasting value of the past two years
2 has been the record, then let's test that premise with
3 the idea of an advisory committee, and that advisory
4 committee would be the first step in looking to the
5 evidence that's gone on to see how good it can be in
6 terms of being integrated with the intervenor's
7 evidence that has been filed so that we can come up
8 with some true value for the ratepayers of the
9 province. Because as I say, in AMPCO's view, although
10 the DSP is gone, the long-term planning issues remain.

11 Those would be my submissions.

12 THE CHAIRMAN: Thank you.

13 Mr. Heintzman?

14 MR. HEINTZMAN: Mr. Chairman, as I said
15 this morning morning, AECL's position has been that the
16 hearing ought not to be discontinued. And it is my
17 submission that this afternoon's remarks are an
18 eloquent testimony to the reasons and the rationale for
19 my submissions this morning. And that those who have
20 spoken about the ongoing hearing or inquiry process,
21 their remarks speak to the advisability of the present
22 hearing.

23 And indeed, the government's news release
24 where it says -- and it is inviting you to participate
25 on issues of conservation, demand management, load

1 forecasts, private power producers, et cetera, that
2 that again is eloquent testimony that the DSP needs to
3 be reviewed and the advisability of it which was said
4 in 1970 and the Minister has never said that's not
5 advisable and is saying it is still advisable that
6 those matters be reviewed.

7 THE CHAIRMAN: You must not use this
8 opportunity to reinforce your argument you made this
9 morning.

10 MR. HEINTZMAN: The point I am seeking to
11 make is that we have chosen to make our submissions on
12 the issues addressed by others in that context. And it
13 is only in the context of the Board being attracted
14 towards the option being presented to the government
15 that we have put forth what we consider to be the
16 minimum that the Board should ask as panel members in a
17 new inquiry if that process were to be acceptable.

18 And I only want to emphasize two points
19 since we spent a considerable amount of time putting it
20 into writing, and those are of dealt with in paragraph
21 28 (A) and (B) of the factum.

22 The first is that while the government
23 would want you, it seems from their press release to
24 deal with four issues, or they have only enumerated
25 four, AECL insists and asks the Board to insist that

1 the subject matters before this Board be within the
2 jurisdiction of the Panel.

3 [4:58 p.m.]

4 Particularly those relating to planning,
5 planning to the upper base load generation, decisions
6 between base load generation and nuclear generation, in
7 my submission for those to be removed from your menu is
8 exactly contrary to the spirit and intent of the Act,
9 which requires that all alternatives be fairly judged
10 one against the other and that you cannot fulfill your
11 function to speak helpfully about any of the issues
12 listed in the press release unless you speak, as Mr.
13 Rogers has said, to those which concern us; namely,
14 planning, which is at the bottom of all of this, and
15 base load generation alternatives.

16 As the second point, it is made in
17 paragraph 28(B), and there is mention in the press
18 release that you would be asked to speak to maintenance
19 and refurbishing of existing facilities, and our
20 concern is that this may be an effort to deal with
21 Bruce "A" and the retubing refurbishing of Bruce "A".

22 Now, in specifics that issue has not been
23 the subject matter of this hearing. It is true that
24 there has been evidence led on the subject as a subject
25 that you would consider in the long-term plan, but the

1 specifics of whether Bruce "A" should be retubed or
2 whether it should be refurbished has been a matter that
3 has been studied by Ontario Hydro, and in my respectful
4 submission should not be part of the ongoing Panel
5 inquiry. It has not been a matter of this Board's
6 central jurisdiction, and it should not be within your
7 mandate if you proceed further.

8 Those are my submissions.

9 THE CHAIRMAN: Thank you. Mr. Power?

10 MR. POWER: Sir, I just have a few brief
11 comments.

12 Firstly, my client supports Mr.
13 Campbell's comments about the ability of this Panel to
14 develop a process which should be able to meet
15 everybody's needs. We recognize that there are
16 problems as well. We have concerns, but I think we are
17 willing to work with everybody to try and resolve the
18 concerns.

19 Also, my client has also the same view
20 regarding the inadequacies of the present adversarial
21 process, and frankly looks forward to a non-adversarial
22 process.

23 It has been very hard to explain to the
24 10 municipalities in the Bruce region the value of the
25 procedural haggling that has gone on relative to what

1 they believe are the substantive real issues.

2 I think perhaps a good insight into what
3 I am saying, which I think is relative to your decision
4 to carry on with the process, is the note I got back
5 last night when I advised them that Hydro was going to
6 withdraw. It reads as follows:

7 Ontario Hydro has a review process
8 underway on Bruce "A". They are doing
9 their best to retain all the jobs.
10 However, realistically 1,000 jobs will be
11 lost in any event at the Bruce Nuclear
12 Power Development. The community will
13 lose not only these one thousand jobs but
14 the indirect jobs of at least another two
15 thousand.

16 In the Ontario Hydro process they
17 have no method of allowing the community
18 to participate except by the appointment
19 to a minor first level sub-committee that
20 has no ties to any upper level Ontario
21 Hydro management where decisions will be
22 considered and approved or rejected.

23 This community really needs an
24 independent voice to speak to energy planning in this
25 province. They don't believe Ontario Hydro is going to

1 listen, and they don't believe the government of
2 Ontario is going to listen.

3 That is why they got involved in this
4 process back in 1989, and they have committed
5 significant community resources. They would greatly
6 appreciate if you would be willing to carry on this
7 process to some degree so that they can tell their tale
8 at least, have somebody listen to it, and then see
9 where we all go as a province from there.

10 Thank you very much.

11 THE CHAIRMAN: Mr. Anshan, are you going
12 to make submissions?

13 MR. ANSHAN: Just a few brief remarks,
14 Mr. Chairman, Members of the Panel, on behalf of
15 CAESCO.

16 CAESCO, the Canadian Association of
17 Energy Service Companies, believes that the work which
18 has been commenced by this hearing should be utilized
19 in some form, and if the Board accedes to the request
20 of the government to form itself into an advisory
21 committee we believe you should do so provided that
22 appropriate terms of reference can be implemented and
23 that whatever report or reports are ultimately
24 submitted by you to the government are done so,
25 provided however that they are not considered as any

1 kind of approval or a basis upon which Ontario Hydro
2 can take any actions with regard to demand and supply
3 which it cannot do otherwise by legal means.

4 In effect, the view of CAESCO is that any
5 reports you do produce should simply be viewed as a
6 reference tool for use by the government in looking at
7 energy policy in the province.

8 You are being requested to submit your
9 views and recommendations on a number of matters,
10 quoting from the Minister's letter the other day:
11 matters relating to the importance to the province of
12 an environmentally sound, reliable and cost effective
13 electricity supply.

14 This request was further expanded upon in
15 the press release issued January 26th of '93, wherein
16 the government requested the advisory committee to
17 report on among other topics the question of
18 conservation and demand management programs.

19 It is on these particular subjects that
20 CAESCO was intending to participate as part of
21 Intervenor Panel 3A, Demand Management, by bringing
22 forward evidence to assist this Panel in regards to
23 demand management programs, and in particular the
24 application of energy performance contracting and its
25 positive effect on energy conservation.

1 CAESCO has filed its witness statements
2 on these matters and is prepared to provide what it
3 believes would be extremely useful information and data
4 which would have assisted this Panel and will assist
5 this Panel if it accedes to the government's request in
6 formulating its ideas and recommendations on
7 conservation and demand management.

8 It is important in our view that this
9 relatively new and high-growth industry represented by
10 CAESCO in Canada be given the opportunity to
11 participate in this public policy deliberation and
12 provide the information which the committee will need
13 in order to complete the demand management picture.

14 If you choose to continue as an advisory
15 board it is important for the Panel to hear how CAESCO
16 and the industry it represents is presently engaged in
17 a variety of activities and initiatives across Canada
18 with power-smart utilities and the federal government
19 through the recently enacted Federal Buildings
20 Initiative.

21 These are but two important examples of
22 how innovating methods are being employed by the
23 private sector with the partnership of government to
24 achieve significant energy savings that are
25 environmentally sound and economic.

1 Of particular significance are the
2 proposals CAESCO has formulated to build on the
3 excellent working relationship the industry has enjoyed
4 with Ontario Hydro's Energy Management Branch. They
5 represent a serious and practical approach to zero debt
6 DSM, mobilizing private sector capital and resources.

7 We therefore respectfully request that if
8 you in fact agree to the government's request that you
9 provide a process by which groups like CAESCO can
10 participate effectively in your deliberations.

11 Thank you.

12 THE CHAIRMAN: Anyone else?

13 MR. BULLOCK: Mr. Bullock.

14 THE CHAIRMAN: Mr. Bullock. Then Mr.
15 Monger.

16 MR. BULLOCK: CNA finds itself in
17 substantial agreement, Mr. Chairman, with AMPCO and
18 AECL's submissions this afternoon. Planning issues are
19 not going to go away.

20 THE CHAIRMAN: Thank you.

21 MR. MONGER: Mr. Chairman, the CAC
22 (Ontario) endorses the idea that meaningful steps ought
23 to be taken to preserve the record generated by this
24 hearing and is amenable to this or the members of this
25 Panel participating in any such process.

1 They believe that it would be of great
2 value to the people of Ontario to have this Board
3 summarize the evidence that has been heard to date, all
4 30,000 pages of it and the evidence that has been
5 filed, such that the issues raised at this hearing can
6 be brought together in a reasonably concise document
7 that can be used by the members or the participants in
8 this hearing and those who have not heard the evidence
9 and issues that were raised at this hearing.

10 Similarly, the client believes that this
11 Panel could make some very useful suggestions as to the
12 procedural issues raised by a hearing of this scope, if
13 that is the kind of thing that the government is
14 interested this hearing about.

15 It is obvious to us that the government
16 is interested in getting more than that out of you and
17 more than a summation of the evidence or analysis of
18 the process in that it is looking for you to assess the
19 evidence.

20 It is not clear to my client at the
21 moment what kind of assessment is anticipated or what
22 the basis of the assessment is to be. As far as we
23 know, there have been no sort of benchmarks laid out as
24 to what you are supposed to be assessing the evidence
25 against, and that causes us some concern.

1 That is not to say that they don't think
2 that it might not be proper for you to participate in
3 the assessment, but they believe that one of the first
4 things that must be laid out is what kind of assessment
5 is anticipated. And if this hasn't been formulated yet
6 then they would like to participate in the process of
7 just what kind of assessment of the evidence you are
8 going to produce at the end of the day.

9 Furthermore, my client believes that it
10 ought to be clear from the start what the purpose and
11 effect of any report that you produce will be.

12 Obviously, if this is known it will
13 affect how the various intervenors and other members of
14 the public approach the work of the committee, and it
15 is our submission that at the moment this has not been
16 clearly defined, as clearly defined as it ought to be.

17 My client places a great deal of faith in
18 the ability of the Members of this Panel to bring
19 balance to the resulting report in light of the fact
20 that the proponent has had a much greater opportunity
21 to present their evidence than any of the intervenors
22 have had.

23 One of the first tasks of the committee
24 ought to be, it is our submission, a clear laying out
25 of the process that will guarantee that this balance is

1 maintained and is achieved at the end of the day, and
2 should the members of this Board decide to accept the
3 government's offer the CAC would be willing to make any
4 submissions that the Board might think is useful in
5 terms of how the process should appear.

6 Thank you.

7 THE CHAIRMAN: Anyone else? Mr.
8 Campbell, are you going to make submissions?

9 MR. B. CAMPBELL: Having been away for a
10 portion of the afternoon I think Mrs. Formusa is going
11 to deal with this matter.

12 THE CHAIRMAN: Mrs. Formusa is going to
13 make submissions.

14 MRS. FORMUSA: Mr. Chairman and Members
15 of the Panel, first I can confirm that Ontario Hydro
16 will be considering what will be required to ensure
17 that the site-specific applications now underway fully
18 address all the requirements of the Environmental
19 Assessment Act.

20 Ontario Hydro is supportive of any
21 process which assures that the efforts of all
22 participants in the Demand/Supply Plan hearings will
23 not have been wasted.

24 Hydro has a variety of major decisions to
25 make this year. Hydro believes that the report of the

1 advisory committee will provide valuable input into the
2 context for those decisions.

3 Further, Ontario Hydro is confident that
4 the advisory committee can achieve a fair and full
5 consideration of relevant issues and can produce a
6 useful report.

7 Mr. Chairman, those are our submissions.
8 Thank you.

9 THE CHAIRMAN: Anybody else?

10 MR. D. POCH: Mr. Chairman, I am
11 wondering if I could have about 10 seconds of reply and
12 just ask a question of clarification?

13 THE CHAIRMAN: Certainly.

14 MR. D. POCH: Thank you, Mr. Chairman.

15 By way of reply, my friends from the
16 government say that this is an entirely separate
17 process; it is not the Environmental Assessment Act.

18 Of course, as a formal matter that is
19 true, at least in form. But I simply point to the
20 press release where Mrs. Grier is quoted as saying:
21 The environmental assessment process must be
22 responsive.

23 It would appear that even the Minister is
24 considering what is going to happen here a response of
25 the environmental assessment process. That just

1 confirms for us the concern about the confusion that
2 will exist, the impression that will be left.

3 By way of question, I don't know what to
4 make of Mrs. Formusa's opening comments about Hydro
5 assessing what it means to fully comply with the Act.

6 I took it from Ms. Couban's comment that we now have a
7 formal commitment on the record that the government
8 will not grant an exemption in whole or in part under
9 the Environmental Assessment Act for approvals of
10 hydraulic facilities. She can later correct me if that
11 interpretation is wrong, but I appreciate her putting
12 that on the record and I assume that my interpretation
13 is in fact correct.

14 Thank you, Mr. Chairman.

15 THE CHAIRMAN: Well, I think I heard Mr.
16 Campbell say that all those assessments will require
17 some amendment. Did he not say that?

18 MR. D. POCH: Well, certainly that will
19 be the case, given the position the government has
20 taken today, if I have interpreted it correctly.

21 Thank you.

22 ---Off the record discussion.

23 THE CHAIRMAN: We are of the view that we
24 can deal with the issue that was before us this morning
25 at this point, but we need of course to consider it.

1 We would like to do it now, if we can,
2 because it would be good to get it disposed of. We
3 will have to confer, and I don't know how long that
4 will take, but I crave your indulgence in this respect.
5 But we will adjourn for at least one half hour, and
6 then if we are ready to give a decision we will give
7 it; if we aren't able to we won't. I will kind of
8 leave it that way with you.

9 THE REGISTRAR: This hearing will adjourn
10 until recalled.

11 ---Recess at 5:15 p.m.

12 ---On resuming at 5:50 p.m.

13 THE REGISTRAR: Please come to order.
14 This hearing is again in session. Be seated, please.

15 THE CHAIRMAN: In December of 1989, the
16 proponent, Ontario Hydro, submitted a Demand/Supply
17 Plan to the Minister of the Environment as an
18 environmental assessment under the Environmental
19 Assessment Act.

20 In January of 1990 the Minister required
21 the Board to hold a hearing with jurisdiction as set
22 out in Section 12(2)(c)(d) and (e) of the Environmental
23 Assessment Act.

24 After considerable evidence and the ,
25 filing of a great number of exhibits, Ontario Hydro

1 wrote to the Board on January 25 of this year stating
2 its intention to withdraw its application, and on the
3 following day at the opening of the hearing it
4 confirmed that intention. It subsequently made clear
5 that the application was the environmental assessment
6 filed in 1989.

7 The Minister, by letter dated January
8 25th, 1993, wrote to the members of this panel
9 requesting that they form an advisory committee. That
10 letter is on file as an exhibit.

11 Subsequently, the Government of Ontario
12 issued a press release under the letterhead of Ministry
13 of Environment dated January 26th, 1993, entitled
14 "Province Requests Report on Ontario Hydro Planning
15 Issues."

16 Section 7(3) of the Environmental
17 Assessment Act provides, in effect, that a proponent
18 may withdraw an environmental assessment subject to
19 such terms and conditions as the Minister may by order
20 impose. That subsection contains the only provision in
21 the statute permitting a proponent to withdraw an
22 environmental assessment.

23 It was submitted that Section 7(3) did
24 not apply to the situation before us because of the
25 intervention of the hearing process in the context of

1 the statute.

2 It was further submitted that there was
3 no specific provision in the statute dealing with the
4 withdrawal of an environmental assessment in the course
5 of a hearing. Such a withdrawal could be accomplished
6 only with leave of the Board which could either refuse
7 leave or grant it with or without terms and conditions.

8 While it is not precisely clear in the
9 statute, it is our view that Section 7(3) applies to
10 the situation which is now before us.

11 In our view under the scheme of the
12 statute, which in essence provides that a proponent who
13 wishes to engage in certain activity must comply with
14 the environmental assessment legislation, there must of
15 necessity be some ability to withdraw should a
16 proponent decide it no longer wishes to proceed. One
17 has to be concerned that such a right not be
18 untrammelled because there is a possibility of abuse.
19 The Legislature has dealt with that matter by
20 empowering the Minister to impose terms and conditions
21 on a withdrawal.

22 It is clear from the situation that is
23 before us and by the statements made by counsel for the
24 Minister that the Minister has accepted the withdrawal
25 submitted by Ontario Hydro and has chosen not to impose

1 terms and conditions. It therefore follows that there
2 is nothing further for this panel to do with respect to
3 this particular environmental assessment.

4 If we are wrong in that conclusion, then
5 we should consider the alternative, which is that when
6 a proponent asks to withdraw an application, we should
7 either allow him to do so on the basis that he has an
8 untrammelled right to do that or we should require him
9 to obtain leave and if granted, impose terms and
10 conditions if appropriate.

11 There was argument addressed to us that
12 Section 4 of the Statutory Powers Procedure Act applied
13 to this situation. We do not consider that it has any
14 application to the issue. It is a permissive section
15 and the situations envisaged by it do not apply to what
16 is now before us.

17 We have all come to the conclusion that
18 we do not have to decide the issue because assuming
19 without deciding that Ontario Hydro has to obtain
20 leave, we would be prepared to grant it without terms
21 and conditions.

22 There are no longer any approvals being
23 requested by Ontario Hydro. If the assessment were to
24 remain in place, it would be a cumbersome and expensive
25 exercise to continue with the hearing in such a

1 context, and in our view would serve little useful
2 purpose relevant to the Environmental Assessment Act.

3 Continuing would, in our view, not be in
4 the public interest. It would be difficult to justify
5 the additional expense.

6 While a termination leaves unanswered
7 many important public questions, it is possible that
8 those questions can be more expeditiously addressed by
9 other means.

10 There remains, as we have said, the
11 issues of the completion of intervenor funding and of
12 costs, and possibly other yet unidentified procedural
13 matters, but apart from that, these proceedings are now
14 terminated.

15 We are grateful to the parties who
16 appeared today and have listened with great interest to
17 their comments on the proposal that has been made by
18 the Government of Ontario. We shall certainly take
19 them into consideration carefully.

20 Thank you very much for staying so late,
21 and we will now adjourn. I am not sure if that's the
22 right word, but I couldn't think of anything else at
23 this hour of the night.

24 , MR. HEINTZMAN: Mr. Chairman, can you
25 tell us when we might be called forth to make

1 submissions as to costs or how that will be dealt with
2 or will you advise us in due course?

3 THE CHAIRMAN: I certainly think we have
4 to deal with them. I haven't given any thought to what
5 that might be. I realize it should be relatively soon.

6 THE REGISTRAR: Please come to order for
7 the last time. These hearings are adjourned
8 completely.

9
10 ---Whereupon the hearing was concluded at 6:02 p.m.

E R R A T A
and
C H A N G E S

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